Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1996

THE VILLAGE OF AIRMONT, and its Municipal Officers,
Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Did the Court below unconstitutionally (1) violate the doctrine of federalism by directing changes to a zoning code without any evidence that anyone was harmed by the zoning code; (2) direct injunctive relief where there was no wrong to remedy in the case?

PARTIES

The parties are fully stated in the caption of this case.

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OPINION BELOW

This determination by the Court of Appeals for the Second Circuit was rendered by Summary Order on December 6, 1996. The Summary Order provided that the Second Circuit Decision "will not be published in the Federal Reporter and may not be cited as precedential authority." The Summary Order contained the opinion of the Court and is set forth in Exhibit "A". The Summary Order was issued as a mandate on January 22, 1997.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

In this Petition, Petitioners are municipal officers ("individual Petitioners") and the municipal entity of the Village of Airmont, New York ("Village"). In January 1993 the Village adopted its first zoning code regulating inter alia places of religious worship within the Village. Prior to the Code being adopted by the Village in January 1993, the Respondents initiated litigation against the Village alleging inter alia that the Village and its municipal officers utilized zoning in a religiously discriminatory fashion even though no zoning code existed at that time. Petitioners had adopted a facially neutral zoning code zoning traditional places of worship such as a synagogue or church in residential areas provided a two acre minimum lot size existed. Under the Village's zoning code, variances for religious uses were permitted if the lot size to be used for religious worship was less than two acres. The Village Zoning Code also allowed small groups of individuals gathering for prayer in a residential structure. Individual respondents in this matter are Orthodox Jewish residents of the Village requiring a place of religious worship within walking distance of their residences. The Respondent United States of America ("Government"),

commenced its action against Petitioners under the Fair Housing Act urging that the Village's yet-to-be enacted Zoning Code was unconstitutional.

After a two month trial, the jury dismissed all claims against individual Respondents. The jury, however, found that the Village had violated the individual Respondents rights under the Fair Housing Act and that the Village conspired to violate Respondents' First Amendments rights. But, the jury awarded zero damages. Following the jury verdict, upon application by Petitioners, the District Court dismissed the Government action and granted the Village's application for a judgment as a matter of law dismissing all Respondents' claims. Respondents appealed to the Second Circuit Court of Appeals and by judgment dated September 21, 1995 the Second Circuit reversed the District Court. A Petition for a Writ of Certiorari to the United States Supreme Court was sought and previously denied.

Thereafter, by Decisions dated April 25, 1996 and April 29, 1996 the District Court on remand from the Second Circuit issued injunctive relief as directed though acknowledging that by doing so it was violating Supreme Court precedent. Petitioners again timely appealed to the Second Circuit Court of Appeals and that Court by Summary Order dated December 6, 1996 affirmed the District Court Decision on the remedy imposed. Petitioners now seek a Writ of Certiorari to this Court. The Docket Number in the Court below was 96-6149.

Jurisdiction of the Court of Appeals for the Second Circuit was pursuant to 28 U.S.C. 1295(a)(4)(6)(10) and for this Court is 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

In Rockland County, New York the early 1980's saw a zoning movement taking place. This movement involved

the creation of local governments establishing zoning controls in several newly formed villages. In all of these village movements, the primary focus of village incorporation involved enactment of a local zoning ordinance. Before incorporation of the Village of Airmont ("Village"), the Town of Ramapo within which the Village was located had interpreted the "home professional office" zoning category of its local zoning code as a planning device to accommodate Orthodox Jewish residents needing a place of worship in a residential neighborhood. The Town of Ramapo's own zoning official conceded this "interpretation" was "relatively unique" throughout the entire nation. The home professional office zoning concept was utilized since certain Orthodox Jewish sects did not have funds to purchase a traditionally sized lot to establish a freestanding place of worship within walking distance of their residence.

Orthodox Jewish residents are required to walk to religious services on the Sabbath. To accommodate religious needs, the Village's zoning ordinance permitted places of worship in residential districts provided a minimum two acre lot existed. Although the Village's facially neutral zoning ordinance permitted a place of worship within walking distance from residential lots owned by Orthodox Jewish residents, the Respondent Orthodox Rabbi testified that "economics" prevented purchase of a two acre size lot for a place of worship in the Village. The Village's zoning code, however, did allow for variances to be granted from the two acre lot minimum for those sects who could not acquire the minimum sized lot. Also, the Village's zoning code had not yet been interpreted when Respondents sued to allow a place of worship under the "home professional office" zoning classification as did the Town of Ramapo zoning code.

The record in this case was clear that the Village's zoning code did not prevent any Orthodox Jewish families

from residing within the Village. Likewise, the record is clear that no Orthodox Jewish residents were required to relocate from the Village as a result of its zoning ordinances. And, most significantly no Orthodox Jewish residents were prevented from praying or exercising their religion due to the Village's Zoning Code. In fact, the number of Orthodox Jewish residents in the Village increased dramatically since adoption of the Village's zoning ordinance. Additionally, all of the individual Respondents who practiced the Orthodox Jewish faith conceded under oath at trial that the Village did not violate any right to religious worship.

Although Respondents sued under a Fair Housing Act claim, by self-selection within the Village the residential area occupied by individual Respondents was referred to as a "Torah Community" and was developed by a builder who previously developed "an exclusively Orthodox community." The Second Circuit Court of Appeals, however, did not object to this practice of segregated religious neighborhoods. On the contrary, the Second Circuit required the Village's zoning code to favor the religious practices of Orthodox Jewish residents where such zoning code was otherwise facially neutral in establishing places of worship.

Notwithstanding the uncontroverted facts that not a single Orthodox Jewish Respondent was prevented from attending prayer service or religious worship and that no Orthodox Jewish resident claimed to be harmed by the Village zoning ordinance, the Court of Appeals reversed the District Court's dismissal of the Government's case. The Circuit Court also reversed the District Court's ultimate dismissal of the individual Respondents' claims under the Fair Housing Act and First Amendment.

After the Second Circuit reversed the District Court, the District Court on April 25, 1996 and April 29, 1996 issued two Orders directing certain declaratory and injunctive

relief. A prohibitory injunction was issued by the District Court enjoining the Village from promoting religious discrimination, denying equal protection to those with religious uses and from discriminating in housing or through housing based upon religion. The District Court upon remand also issued with reservations that its action was unconstitutional a mandatory injunction ordering the Village to revise its zoning code to include an as of right use for residential places of worship.

Petitioners timely appealed from the District Court Order to the Second Circuit Court of Appeals. The Second Circuit affirmed the District Court recognizing, however, that the District Court "ordered mandatory injunctive relief grudgingly, arguing that in doing so he was forced to ignore the Supreme Court's recent instruction that injunctive relief in such cases be remedial in nature." Additionally, the Second Circuit curiously determined that because an injunctive measure was prospective "does not imply that it is not remedial." In its Summary Order the Second Circuit rejected "all" arguments raised by the Village as being "without merit." This Petition for a Writ of Certiorari is from the aforementioned Order by the Court of Appeals for the Second Circuit.

I.

THIS PETITION SHOULD BE GRANTED SINCE THE DOCTRINE OF FEDERALISM WAS VIOLATED BY THE COURT BELOW

Throughout our history as a nation, the fundamental principal has existed that powers should not be concentrated in either one branch or government - neither the federal nor state sovereign. In James Madison's words, "The accumulation of all powers, legislative, executive, and

judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." (The Federalist No. 47 at 301 (James Madison) (Clinton Rossiter Ed. 1961). It is respectfully submitted that the Second Circuit Decision has created a federal tyranny over state and local issues.

Although Madison was referring to the separation of powers within a government, his reasoning is particularly applicable to the separation of powers between state and federal governments. The Second Circuit Decision totally violated principles of federalism in its Summary Order and disregarded considerations of State sovereignty. The District Court itself remarked that because it was constrained by the prior Second Circuit determination of September 1995, the injunctive relief was being provided "despite the Supreme Court's teachings in Rizzo v. Good, 423 U.S. 362, 44 L.Ed. 2nd, 561, 96 S.Ct. 598 (1976)." LeBlanc-Sternberg v. Fletcher, 922 F.Supp. 959, 972, fn.2 (S.D.N.Y.). The District Court also noted that the Second Circuit disregarded considerations of federalism: "Federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable powers and state administration of its own laws'." Id. In fact, the Second Circuit Decision from which Certiorari is now sought disregarded clear precedent that the constitution provides for a federal government "of limited powers." New York v. United States, 505 U.S. 144, 155 (1992). Instead, the Second Circuit Summary Order has adopted an interpretation of federal equitable powers that "override all principles of federalism." Gregory v. Ashcroft, 501 U.S. 452, 469 (1991).

For these reasons, the Second Circuit issuance of injunctive relief, that even the District Court realized was wrong, was a jurisprudential failure to realize that its holding

"radically change[d] the whole theory of the relations of the state and federal governments to each other." Slaughter House Cases, 83 U.S. 36, 78 (1873). As a leading commentator noted years ago, our Constitution "is founded on a wholesome and strenuous jealousy, which foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, so far as is practicable." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 957 (5th Ed. 1905). The Second Circuit Order not only endangers state zoning power, it totally vitiates such power.

It bears emphasis that the Second Circuit upheld issuance of an injunctive remedy even though every Respondent admitted that the Village did not interfere with their religious worship whatsoever. Accordingly, Federal Court intervention into local affairs was directed herein without any demonstration that specific harm was sustained by any Respondent as a result of the Village's conduct. Such judicial intervention by the Second Circuit totally disregards "local autonomy" which has been a "vital national tradition" in our nation. Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 410 (1977); see also, "Separation of Powers in the Scope of Federal Equitable Remedy," 30 Stan. L. Rev. 661 (1978).

Otherwise stated, the Second Circuit permitted Federal Court intervention into a uniquely local issue such as zoning which resolution is better placed in local governments rather than a Federal Judge. Wright v. City of Emporia, 407 U.S. 451, 477-478 (1972). While the Second Circuit found that it was "likely" the Village may violate constitutional rights by future conduct, this prognostication was not based upon any evidence. Instead, it was "appellate alchemy" recognized by the District Court to enable the Second Circuit to reach its conclusion of resolving an issue of that day. Such appellate practices strip away local municipal power and upset the

division of power between Federal and State sovereigns. See, e.g, Missouri v. Jenkins, ___U.S.___, ___, 115 S Ct. 2038, 2049 and 2056 (1995), citing Freeman v. Pitts, 503 U.S. 467, 489 (1992)(proper structural remedy should restore local autonomy).

By reason of the foregoing, the Second Circuit Court acted unconstitutionally since "the constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we must resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." New York v. United States, 505 U.S. 144, 187 (1992). The Second Circuit Decision now concentrates zoning power in federal, rather than local or state hands. Therefore, certiorari should be granted by this Court to review that determination by the Second Circuit Court of Appeals herein.

II.
WHERE A REMEDIAL INJUNCTION WAS ISSUED DESPITE THE ABSENCE OF ANY WRONG TO REMEDY THIS COURT SHOULD TAKE CERTIORARI

In this appeal, the Second Circuit considered a record where all Respondents conceded that the Village did not interfere with their right to pray. As such, the individual Respondents have sustained no wrong that could be remedied by an injunction. Yet, the Second Circuit exercised its injunctive powers to uphold a remedial injunction under the guise that it was "prospective" only. Such a judicial exercise is totally without precedent in our jurisprudence and this Court should therefore accept certiorari.

As even the Second Circuit noted in its Summary Order, a Federal Court exercising equitable powers must focus on the three factors espoused in Milliken v. Bradley, 433 U.S. 267, 280-281 (1977), the second factor of which demands that the "equitable decree must be remedial in nature, i.e. it must restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Exhibit A, quoting Milliken, 433 U.S. at 280-281. In this case, as the Supreme Court has stated before in following the requirement that an exercise of equitable powers by Federal Courts be remedial in nature

> [The] judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary remedies in the past.... Such extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers design.

Jenkins, 115 S.Ct. at 2067 (Thomas, J., concurring). Certainly, the Second Circuit has now approved such

"extraordinary" equitable relief by dramatically changing a local zoning code even though the individual Respondents never claimed to be harmed by the Code.

Furthermore, the remedy must be limited and fashioned, "as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Jenkins, 115 S.Ct. at 2048, quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267 (1971). Rewriting a local zoning code, as the Federal Courts below have sanctioned in the present case, clearly extends beyond restoring the Respondents to the position they would have occupied in the absence of discrimination. As this Court recently ruled in Lewis v. Casey, "The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the Plaintiff has established." ___ U.S. ___, ___, 116 S.Ct. 2174, 2183 (1996). Yet, the remedy fashioned in the present case has gone far beyond the "injury-in-fact" and fashioned a remedy far overreaching its judicial capacity and disregarding precedent. Respondents here admittedly proved no injury-in-fact so there was therefore no existing wrong to remedy. Therefore, the remedy imposed upon the Petitioner Village exceeds the "well settled principle that the nature and scope of the remedy are to be determined by the violation" and violates appropriate Federal judicial authority because it is aimed at a "condition [the Zoning Code] that does not violate the Constitution [and] does not flow from such a violation." Milliken, 433 U.S. at 281-282. Even the far afield Eleventh Circuit case inapplicably relied upon by the Second Circuit to justify broad equitably powers under the Fair Housing Act, Marable v. Walker, 704 F.2d 1219 (11th Cir. 1983), acknowledges that "[T]he relief must be tailored in each instance to the needs of the particular situation." Id. at 1221. The Airmont Zoning Code is clearly neutral on its

face. In this "particular situation" the Second Circuit predicts a potential "threat" of future discrimination. Yet, the Circuit and District Courts went far beyond tailoring the relief to fit this particular need and trampled over the constitution and this Court's long embraced principles of federalism in their wake. An order enjoining Petitioners from discriminating against Respondents "in the future" would have clearly been the remedy most fittingly tailored to the particular situation of a threatened "future" harm.

The Supreme Court has also recognized that when the Federal Judiciary must interfere with local government, as in the school desegregation cases, as a safeguard and protection of federalism principles and State autonomy, such interference must be of a temporary nature. The goal is to restore control back to the municipality in which it rightly belongs. See, e.g., Jenkins, 115 S.Ct. at 2049. In the present case, the Court below has dictated the sections and language to be included into the Airmont Zoning Code, and thus completely usurped the autonomy and power of the municipality to zone for its public health, safety and general welfare. This takes away the power of the Village to amend its code indefinitely, effectively forever. And, all this has been done despite the fact that there has been no interference with Respondents' exercise of religion by the Petitioners, and certainly not by the Petitioner Village's Zoning Code which is neutral on its face.

Even if the Second Circuit unearthed some "threat" of future discrimination (despite the jury and District Judge's failure to uncover it after a two month trial), "however troubling that [potential discrimination] may be, remedying it is within the District Court's authority only if it is directly caused by the constitutional violation." Jenkins, 115 S.Ct. at 2060 (O'Connor, J., concurring)(internal citation omitted). In the present case there is absolutely nothing in the Village

Zoning Code which precluded home religious worship; and in fact, the Code allows home worship in residential zones and allows for a variance from the two acre lot requirement for a freestanding Synagogue. Therefore the Zoning Code cannot be said to have "directly caused a constitutional violation." See Id. Thus, there has been no "default by the [Village] authorities" to enforce its Zoning Code in a non-discriminatory manner, as is required before a Court may step in and resort to such extraordinary interference. Jenkins, 115 S.Ct. at 2067 (Thomas, J., concurring), citing Swann, 402 U.S. at 16.

Further, even though the Second Circuit suspects a future "threat" of possible discrimination to some unknown individual, not a single party to this suit has been prevented from practicing their religion or injured by the Zoning Code, and such a widespread restructuring remedial order cannot therefore be justified. Lewis, ___ U.S. at ___, 116 S.Ct. at 2183-2184; see also, Dayton Bd. of Ed., 433 U.S. at 417 (1988)(system-wide remedy is beyond Court's scope where more specific and less intrusive remedy is available); Califano v. Yamasaki, 422 U.S. 682, 702 (1979)(scope of relief must be tailored to the specific injury established).

The Second Circuit has here upheld issuance of injunctive relief over the protest by the District Court Judge who presided over the trial and all previous proceedings that no evidence in the record demonstrated a need to remedy any right of Orthodox Jewish residents to pray. Since Federal Court degrees exceed appropriate limits if they are aimed at a eliminating a condition that does not violate the constitution, Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); see also, Lewis, supra; Dayton, supra, a fortiori a Federal Court degree exceeds appropriate limits where the condition (e.g. inability to pray) was not even violated. See, Hills v. Gautreux, 425 U.S. 284 (1976).

Whatever violation was found through "appellate alchemy" by the Second Circuit does not obviate the unambiguous fact that no violation of Respondents' right to pray occurred.

Lastly, the zoning code provisions mandated by the lower Courts' remedial orders give a preference to the Orthodox home-Synagogue use. In fact, the Second Circuit sanctioned that this use be given an "as of right" status over and above all other home-office and home-clergy type. Aside from usuriously, and wrongfully, divesting the locality of all autonomy in this regard, it provides an unconstitutional preference for this religion. See, e.g., City of Richmond v. J.R. Croson Co., 488 U.S. 469, 508 & 510 (1989).

As such, there clearly exists no basis for the Second Circuit extraordinary affirmance of a remedy without a wrong.

III.
A DEEP DIVISION EXISTS IN THE CIRCUITS WARRANTING THIS PETITION BEING GRANTED

This ruling by the Second Circuit is in conflict with decisions in other circuits. And, there exists a deep division in the Circuits regarding a municipality's right to zone religious uses.

Beginning in Lakewood v. City of Lakewood, 699 F.2d 303 (5th Cir.), cert. denied, 464 U.S. 815 (1983), the issue of local zoning powers involving First Amendment issues was reviewed by the Circuit Courts. In Lakewood the Sixth Circuit considered a municipal zoning ordinance prohibition of religious places of worship in all residential zoning districts. 699 F.2d at 303-304). The Sixth Circuit remarked that the impact of such zoning ordinances on places of worship created an indirect financial burden on religious

practices. Id. at 307. The Sixth Circuit later observed "[t]he burdens of the ordinance are the increase cost of purchasing land" Id., just as Respondents admitted in the present case. And thus, a direct financial burden to practicing religion as a result of local zoning ordinance was found to be constitutional by the Sixth Circuit.

Contrary to the holding herein by the Second Circuit, in Lakewood the Sixth Circuit expressly noted:

> The Lakewood ordinance "simply regulates a secular activity and, as applied to the appellants operates so as to make the practice of their religious beliefs more expensive." [quoting] 366 U.S. at 605, 81 S.Ct. at 1146. It does not pressure the Congregation to abandoned its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause has not been infringed.

Id. at 307-308, citing Braunfield v. Brown, 366 U.S. 599 (1961). Therefore, the Sixth Circuit holding in Lakewood followed established Supreme Court precedent under Braunfield v. Brown, 366 U.S. 599 (1961) rejecting a free

exercise claim where only a financial hardship in religious practices would result from a local zoning ordinance. In so holding, the Sixth Circuit in Lakewood (unlike the Second Circuit herein) did not require any accommodation for religious worship due to financial constraints in a local zoning ordinance regarding purchase of a minimum lot size.

In agreement with the Sixth Circuit ruling in Lakewood, the Eleventh Circuit in Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984) determined a case on nearly identical facts as the Second Circuit ruling herein. In Grosz, the Eleventh Circuit noted that case "calls for the accommodation of two important values, both embodied in the spirit and letter of the Constitution: Free exercise of religion and the effective use by a state of its police powers. Id. at 730-731. Identical to facts in the instant litigation, Grosz involved an Orthodox Jewish Rabbi who converted a garage area to a place of worship. The local zoning code in Grosz prohibited places of worship in single family residential zones. Also identical to the case at bar, prior to Rabbi Grosz establishing this place of worship, Orthodox Jewish services were conducted in various homes throughout the neighborhood. In Grosz the municipality's zoning ordinance permitted places of worship to operate in other zoning districts than single family residential districts.

The Eleventh Circuit in Grosz found facts similar to the case herein that "well attended (religious) services have disturbed neighbors as a result of persons seeking directions to the Grosz schul, as a result of chanting and singing during the services, and as a result of occasional large congregations of worshippers at the property." Id. at 732. And, contrary to the Second Circuit determination herein, in Grosz the Eleventh Circuit upheld an even more restrictive zoning ordinance despite adverse impact upon the congregation "in

terms of convenience, dollars or aesthetics." Id. at 739. This determination by the Eleventh Circuit followed former Supreme Court Justice Vinson's writing in American Communications Ass'n v. Douds, 339 U.S. 382, 397 (1950), that no free exercise violation existed with a religious group contending "its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." Id. at 740.

Directly contrary to the Sixth and Eleventh Circuit holdings on this issue, the Fifth Circuit in Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) determined that a zoning ordinance prohibiting places of worship in residential districts was unconstitutional. The Fifth Circuit declared the zoning ordinance violated the Free Exercise Clause: "[L]aws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor." Id. at 299. Thus, the Fifth Circuit followed the ratio decidendi of the Second Circuit on this issue. The Islamic Center Circuit Court expressly noted the Lakewood and Grosz decisions, but explicitly elected not to follow those holdings instead declaring, "The burden placed on relatively impecunious Muslim students by the [the municipal zoning] ordinance" was unconstitutional. Id.

This division in the Circuit Courts highlights the difference in measures a municipality must Constitutionally take in its zoning laws to accommodate religious worship. Both Lakewood and Grosz clearly indicate no accommodation is necessary. The holdings in Islamic Center and by the Second Circuit herein mandates municipal accommodation of religious uses in zoning.

Moreover, the Second Circuit herein specifically cited Justice Souter's concurring opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, ____ U.S. ____, 113

S.Ct. 2217 (1993). It bears emphasis that in Lukumi Babalu Aye a concurring opinion by Justice Souter advanced the concept of "substantive neutrality that, in addition to demanding a secular object, would generally require local government to accommodate religious differences by exempting religious practices from formally neutral laws." 113 S.Ct at 2241 (Souter, J., concurring). That concurring opinion by Justice Souter in Lukumi Babalu Aye was a direct challenge to the United States Supreme Court's previous holding in Employment Division v. Smith, 494 U.S. 872 (1990). As Justice Souter observed about the Smith decision, "The four Justices who rejected the Smith rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality." 113 S.Ct. at 2242.

The Second Circuit decision herein upholding a direction that local zoning codes be fashioned to accommodate religious worship adopts the four Justice dissenting opinion in employment Division v. Smith and the concurring opinion by Justice Souter in Lukumi Babalu Aye. Based upon the Second Circuit's deviation from established precedent and the deep division in the Circuits regarding zoning laws and religious worship, certiorari should be granted herein at least to resolve such issues not resolved in City of Boerne v. Flores, ___ U.S. ___ (1997)(submitted Oct. Term 1996, No. 95-2074).

IV.

CONCLUSION

It is respectfully submitted that the determination by the Second Circuit below is contrary to established precedent and deepens a division in the Circuit Courts on the question of religious worship and zoning ordinances. These issues are of great importance to the public interest and should be considered and resolved by the United States Supreme Court.

Wherefore, we pray that the Writ of Certiorari be issued so that these matters above set forth may be considered and resolved.

Dated: Nyack, New York
March 3, 1997

Respectfully submitted,

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CERTIFICATE OF COUNSEL

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well-founded and the cause is one in which the Petition should be granted.

DENNIS E.A. LYNCH
Counsel of Record for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THE SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 6th Day of December, one thousand nine hundred and ninety-six.

PRESENT: HONORABLE JAMES L. OAKES,
HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE JOSE A. CABRANES,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RABBI YITZCHOK LEBLANC-STERNBERG,
CHANIE LEBLANC-STERNBERG,
FRED WALFISH, LEWIS KAMMAN,
PARK AVENUE SYNAGOGUE, INC.,

Plaintiffs-Appellees,

-against-

No. 96-6149

ROBERT FLETCHER, NICK VERTULLO,
RAYMOND KANE, MAUREEN KENDRICK,
JOHN C. LAYNE, Individually and in their
Capacities as Trustees of the Village of Airmont
and as Officers and Board Members of the
Airmont Civic Assoc., and the VILLAGE
OF AIRMONT,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

THE VILLAGE OF AIRMONT,
AIRMONT CIVIC ASSOCIATION,
RALPH BRACCO, in his capacity as Mayor
of the Village of Airmont, JOHN C. LAYNE,
RAYMOND KANE, CHARLES CALOTTA,
and RONALD SABO, in their capacities as
Trustees of the Village of Airmont,

Defendants-Appellants.

----------x

FOR APPELLANTS: Dennis Lynch,
Dorfman, Lynch & Knoebel
Nyack, New York

FOR APPELLEES: Sara L. Shudofsky,
Assistant United States Attorney
Southern District of New York
New York, New York

Craig L. Parshall,
Fredricksburg, VA

Appeal from the United States District Court for the Southern District of New York (Goettel, *J.*).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

The Government filed an action under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), in 1991, against the Village of Airmont ("Village"), alleging that the Village was formed for the purpose of excluding Orthodox Jews by, among other things, imposing restrictions on Jewish forms of residential worship. Specifically, the Airmont Civic Association ("ACA"), and organization whose purpose was the incorporation of the Village was to enact a zoning ordinance completely preventing worship in homes -- a primary method of

Orthodox Jewish worship. At roughly the same time, a private group of rabbis initiated an action, which was consolidated with the government case for discovery and trial. The private action was before a jury, while the government action was tried to the court.

After an eight week trial, a jury found that the Village had violated the Plaintiffs' rights under the FHA and the First Amendment. The District Court (Goettel, *J.*) (S.D.N.Y.) Then dismissed the Government action, reasoning that because the Village had only passed the zoning regulations, but had not applied the regulations, there had not yet been a violation of the FHA. The District Court refused to order injunctive relief because: (1) it would be enjoining acts which were already illegal; and (2) "if there is any action taken in the future which violates [the Orthodox Jews'] rights, the United States Government.... will not be timorous about suing." *United States v. Village of Airmont,* 839 F. Supp. 1054, 1064-65 (S.D.N.Y. 1993) (Airmont I), *rev'd and remanded* 67 F.3d 412 (2d Cir. 1995), *cert. Denied,* 116 S. Ct. 2546 (1996). The District Court then granted the Village's motion for judgment as a matter of law in the private action, and set aside the jury verdict.

In September, 1995, this Court reversed, *see Leblanc-Sternberg v. Fletcher,* 67 F.3d 412, 431 (2d Cir. 1995) *(Airmont II), cert. Denied,* 116 S. Ct. 2546 (1996), reasoning that the evidence supported the jury's determination that the Village had violated the FHA. This Court held that there evidence that the events leading to the incorporation of the town and the implementation of its zoning code "amply support a finding that the impetus was not a legitimate nondiscriminatory reason but rather an animosity toward

Orthodox Jews as a group." *Airmont II*, 67 F. 3d at 431. The Court also held that there was support for the jury's finding that the motivation behind the enactment of the zoning regulations was anti-Semitism, and its "implicit finding that Airmont's zoning code *would be* interpreted to restrict the use of home synagogues. *Id.*(emphasis supplied).

This Court held that the District Court erred in concluding that injunctive relief was not proper, because the FHA explicitly provides that courts enter injunctive relief against parties who have violated the FHA "as is necessary to assure the full enjoyment of the rights granted by the [FHA]." *Airmont II*, 67 F.3d at 434. This Court held that "[t]he view that such relief was premature because Airmont had not yet actually applied its zoning provision invidiously was a misapplication of the [FHA]." *Id.* At 434-35. The Court then directed on remand, that the district court "fashion appropriate equitable remedies." *Id.*

> On remand, Judge Goettel ordered:
> A prohibitory injunction, enjoining the Village from: (1) promoting religious discrimination; (2) denying equal protection to religions by use, interpretation, or enforcement of the zoning code; and (3) discriminating in housing based in housing based on religion, or interfering with the exercise of religion through housing.
>
> A mandatory injunction, requiring the Village to revise its zoning code so that it could not be construed to prevent home worship, or to prevent persons from walking to and from places of religious worship. The Court specifically called for

> an addition to the zoning code entitled "Residential Place of Worship." Such places were defined as "area[s] located within a residence that is used for the conducting of religious services." The order provided that such places "will be permitted by right on any day in all residential zones."
>
> The retention of documents and notification provisions. The Village was ordered to keep all documents related to zoning decisions, notify the Government of any such decisions, or of any meetings of planning or zoning boards at which applications touching on religious worship will be presented.

LeBlanc-Steinberg v. Fletcher, 922 F. Supp. 959, 964-65 n.15 (S.D.N.Y. 1996) (*Airmont III*).

We review a District Court's award of equitable and injunctive relief or abuse of discretion or a clear error of law. *See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1542 (2d Cir. 1996).

The Village argues that the mandatory injunction conflicts with *Milliken v. Bradley*, 433 U.S. 267 (1977) in three respects: (1) the injunction is disproportionate because there is "no existing violation by [the Village]," rather "it was what the Village of Airmont will 'predictably' do that the Second Circuit found improper in its appellate crystal ball;" (2) the injunction is not remedial' and (3) the District Court usurped the role of the local government by creating a new set of zoning regulations, thereby violating well-settled principles of federalism. The Village is wrong.

In *Milliken v. Bradley,* 433 U.S. 267, 280-281 (1977), the Supreme Court noted that a Federal Court exercising its equitable power must focus on three factors: (1) the decree must be remedial in nature, i.e. it must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;" and (3) the Federal Courts must respect the role of state and local authorities in the management of their affairs.

Though by no means unlimited, the power of the Federal Courts to remedy constitutional violations is broad and flexible. *See United States v. Yonkers Bd. Of Educ.,* 837 F.2d 1181, 1235 (2d Cir. 1987). In general, the power to intrude into municipal functions should be exercised only where there has been a constitutional violation. *Id.* The Court should tailor its remedy to fit the nature and extent of the violation. *See Milliken v. Bradley,* 418 U.S. 717, 738 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16 (1971). "The Supreme Court has not required that the 'least restrictive means of implementation' be adopted but has 'recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. *Yonkers,* 837 F.2d at 1236 (quoting *United States v. Paradise,* 480 U.S. 149, 184 (1987) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 508 (1980) (Powell, J. concurring) (*quoting Franks v. Bowman Trans. Co.,* 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part). The District Court has "first-hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,' "and must be

given great flexibility and broad discretion in choosing a remedy best suited to curing the violation. *Paradise,* 480 U.S. at 184 (quoting *Swann,* 402 U.S. at 6). In determining whether [an] order was "narrowly tailored," the court must "acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure [a Constitutional] violation." *Yonkers,* 837 F.2d at 1236 (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965).

A district court has "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id; see also Swann,* 402 U.S. at 15 (scope of a district court's equitable powers to remedy past wrongs is broad). Equitable relief under the FHA may "be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Marable v. Walker,* 704 F.2d 1219, 1221 (11th Cir. 1983). In the past, this and other circuits have allowed Federal District Courts to make changes to, and even strike whole portions of, statutory codes to cure constitutional violations by local municipalities ad ensure that the municipality did not violate the Constitution in the future. *See, e.g., United States v. City of Parma,* 661 F.2d 562, 578 (6th Cir. 1981)., *cert. denied,* 456 U.S. 926 (1982). We have, ourselves, specifically ordered the rezoning of a municipality to ensure compliance with Constitutional mandates. *See Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, *aff'd,* 488 U.S. 15(1988).

1. *Commensurate Remedy.* The Village asserts that there was no existing violation of the FHA, and the only violations were those found in the Second Circuit's "crystal ball."

However, this court previously held that the Village had violated the FHA by passing a zoning code based on religious animus, and found it "predictable from the evidence in this record" that the Village would violate the Constitution by enforcing the code in the future in a discriminatory manner. *Airmont II, 67 F.3d at 434.* This was an egregious constitutional violation, calling for a commensurate injunctive remedy. The District Court needed to fashion a remedy that both cured the past constitutional violation and obviated the threat of future constitutional violations. The District Court therefore issued a prohibitory injunction and a mandatory, forward-looking injunction.

The prohibitory injunction served to cure past constitutional violations by forbidding a repetition of the Village's past discriminatory practices. Judge Goettel was clearly within his discretion when he ordered the Village to cease promoting religious discrimination, denying equal opportunity to religions by use, interpretation, or enforcement of the zoning code in a way to prevent home worship, and from discriminating in housing due to religion, or interfering with the exercise of religion through housing. Such actions are exactly those which the FHA intended to curtail.

Judge Goettel was also clearly within his discretion in ordering forward-looking mandatory injunctive relief against "likely" constitutional violations. The affirmative injunction, requiring the Village to revise its zoning ordinance so that it could not be construed to prevent home worship and to add provisions to protect "Residential Place[s] of Worship," was necessary to ensure that the Village permits the use of residential dwellings for worship.

2. *Remedial in Nature.* Judge Goettel ordered mandatory injunctive relief grudgingly, arguing that in doing so he was forced to ignore the Supreme Court's recent instruction that injunctive relief in such cases be remedial in nature. Judge Goettel felt that affirmative relief did not improve any rights already exercised by Orthodox Jews in Airmont, but "simply [was] insurance that there can be no challenges to their exercise of religion in their homes in the future," and therefore was not truly "remedial." *Airmont III*, 922 F. Supp. at 964 n.15. Generally, a remedial measure is one that places the parties in a position they would have occupied but for the constitutional violation. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2048 (1995). However, that a measure is prospective, because it deters future constitutional violations, does not imply that it is not remedial. In certain instances, prospective injunctions are essential to ensure compliance with constitutional and statutory mandates in the future. *Ct. Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.2d 1103, 1107 (11th Cir. 1994).

Here, the injunction ensured that rights to free exercise of religion were unencumbered, and the constant threat of limitation of those rights was lifted. This forward-looking aspect of the injunction only requires that the Village do that which the FHA and the Constitutioon already requires. *See Marable*, 704 F.2d at 1221 (FHA injunction may be structured to ensure FHA not violated in future and to remove effects of past discrimination). In that regard, it placed the parties in a position which ensured that their constitutional rights remained inviolate.

3. *Federalism.* There is, of course, always a federalism concern when the federal court steps in to remedy some

municipal problem. This court has cautioned that federal courts should not encroach on a state's ability to remedy constitutional deficiencies, should not use a "sledgehammer where a more delicate instrument will suffice," and should not "move too quickly where it appears that the state ... will in its own way adopt reforms bringing its system into compliance with the Constitution." *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986). Here, there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future. Indeed, this Court ruled that future violations were "likely." Given the Village's history and its disregard of this Court's clear holding that it was in violation of the FHA, this injunction was necessary to ensure that the Village complied with the mandate of the FHA.

We have considered all of the arguments raised by the Village, and find them to be without merit.

Accordingly, the judgment of the district court is AFFIRMED.

S/
HON. JAMES L. OAKES,

S/
HON. JOSEPH M. McLAUGLIN,

S/
HON. JOSE A. CABRANES,
Circuit Judges.

Filed: December 6, 1996
U.S. Court of Appeals, Second Circuit
George Lange III, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,
Plaintiff,

-against-

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO in his capacity as Mayor of the Village of Airmont, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA and RONALD SABO, in their capacities as Turstees of the Village of Airmont,
Defendants.

----------x

ORDER
and
JUDGMENT
91 Civ. 8453 (GLG)

This action having been remanded by the Court of Appeals for the entry of declaratory and injunctive relief as against the Village of Airmont, (the Airmont Civic Association having defaulted at the outset of the action), it is ORDERED that:

(1) The Defendant Village of Airmont has violated the Fair Housing Act by enacting its Zoning Code.

(2) The Court enjoins the Defendant, Village of Airmont and its officers, employees, agents, successors, and assigns, as appropriate and all those acting in concert

or participation with them, from:

(a) engaging in any conduct having the purpose or effect of perpetuating or promoting religious discrimination or of denying or abridging the right of any person to equal opportunity on account of religion, including, but not limited to, interpreting the Home Professional Office provision of the Airmont Zoning Code, or any other provision of the Airmont Zoning Code, so as to hinder, prevent, or prohibit persons from assembling in residential dwellings for the purposes of group prayer;

(b) discriminating against any person or group or persons on account of religion in connection with the planning, development, construction, acquisition, financing, operation or approval of any housing in the Village of Airmont;

(c) interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and

(d) taking any action which in any way denies or makes unavailable housing to persons on the basis of religion.

(3) The Village and its officials shall make the following revisions, modifications, deletions, and additions to the Village of Airmont Zoning Code, and

take other affirmative steps as set forth below:

(a) The following paragraph will be added to Article I, Section 3 ("Purposes") of the Airmont Zoning Code;

> G. Nothing in the Zoning Code of the Village of Airmont, New York shall be construed or interpreted in any manner whatsoever so as to hinder, prevent or prohibit individuals from peacefully assembling in residential dwellings solely for the purposes of individual or group prayer.

(b) The following paragraph will be added to Section 2 of Article XVIII ("Definitions"):

> *Residential Place of Worship* - An area located within a residence that is used for the conducting of religious services. It is the intent of this Local Law that the presence of pedestrians walking to and from religious services at a Residential Place of Worship shall not in and of itself constitute a change in the residential character of the neighborhood.

(c) The Residential Place of Worship will be permitted by right on any day in all residential zones. The use would be listed in Article III as Section 5.4 (A) (5) with respect to the R-35 zone.

(d) The term "Place of Worship," defined in Section 2 of Article XVIII ("Definitions"), will be deleted and the term "Free-Standing Place of Worship" substituted in its place throughout the Local Law, and the following will be added to the definition: "except that a portion of the building or structure may be dedicated as living quarters for clergy and their families."

(e) Neighborhood Place of Worship will be defined in Section 2 of Article XVIII ("Definitions") as follows: a building or structure on a lot of at least 20,000 square feet that is used exclusively for the conducting of organized religious services.

(f) The Neighbohood Place of Worship will be permitted in all residential zones, not just the R-15 zone.

(g) In Section 2 of Article XVIII, the last two sentences of the definition of "Home Professional Office" will be deleted.

(4) The following additional affirmative relief shall be ordered:

(a) For a period of five years, the Village and its officials will notify, in advance, counsel for the United States of all meetings of the Village Planning Board and Village Zoning Board and Village Zoning Board of Appeals in which any application relating to religious worship will be

considered, and will provide copies of the agendas of those meetings to counsel for the United States in advance of the meetings.

(b) For a period of five years, the Village and its officials will report to the United States, through counsel, of any proposed changes in the Village's zoning ordinances relating to religious worship, other than those set forth above.

(c) After five years, the Defendant may move the Court to terminate this provision of the order.

So Ordered.

Dated: April 25, 1996
White Plains, New York

Gerard L. Goettel
U.S.D.J.

Filed: April 29, 1996
U.S. District Court
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ORDER
91 Civ. 8453
(GLG)

THE VILLAGE OF AIRMONT,
AIRMONT CIVIC ASSOCIATION,
RALPH BRACCO, in his capacity as
Mayor of the Village of Airmont,
JOHN C. LAYNE, RAYMOND
KANE, CHARLES CALOTTA
and RONALD SABO,in their capacities
as Trustees of the Village of Airmont,

Defendants.

----------x

The Government has submitted a delayed response to this Court's inquiry of April 12, 1996 stating that it was not received until April 24, 1996.

While we have some difficulty in understanding the Government's letter of April 26, 1996, it would appear to be a concession that, despite the changes made at the government's request in the Airmont Zoning Code, there would not be an absolute right to operate a residential house of worship and that therefore there will be situations requiring applications to be made to the Village. That being so we will amend the order already issued in this case to add as a final provision:

4. (d) The Village and its officials shall maintain all applications by any residents of the Village of Airmont to

the Village Planning Board and to the Village Zoning Board of Appeals for residential houses of worship, and the disposition of those applications. The Defendants shall make these applications and dispositions available to the United States for inspection and copying upon reasonable notice.

So Ordered

Dated: April 29, 1996
White Plains, New York

S/
Gerard L. Goettel
U.S.D.J.

Supreme Court, U.S.
FILED
APR 4 1997
CLERK

No. 96-1397

IN THE

Supreme Court of the United States

October Term, 1996

THE VILLAGE OF AIRMONT, and its Municipal Officers,

Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

Brief In Opposition for Rabbi Yitzchock LeBlanc-Sternberg, Chanie LeBlanc-Sternberg, Fred Walfish, Lewis Kamman, and Park Avenue Synagogue, Inc., Respondents

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April 4, 1997

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QUESTIONS PRESENTED

Did the court below (1) violate the doctrine of federalism in granting injunctive relief where the underlying constitutional wrong it sought to remedy consisted of the enactment of a zoning code with a discriminatory animus; (2) exceed its equitable powers in granting injunctive relief where the harm addressed, prospectively, was the constant threat to the rights of Respondents under the Free Exercise Clause?

LIST OF PARTIES

The parties are accurately stated in the caption of the Petition for Writ of Certiorari. Respondent Park Avenue Synagogue, Inc., is a non-profit and non-stock corporation that has no parent or subsidiary companies.

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No. 96-1397

IN THE

Supreme Court of the United States

October Term, 1996

THE VILLAGE OF AIRMONT, and its Municipal Officers,

Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

Brief In Opposition for Rabbi Yitzchock LeBlanc-Sternberg, Chanie LeBlanc-Sternberg, Fred Walfish, Lewis Kamman, and Park Avenue Synagogue, Inc., Respondents

OPINIONS BELOW

Petitioner has accurately referenced the opinion of the Second Circuit Court of Appeals for which review is sought. The first opinion of the Second Circuit related to this case was published at 67 F.3d 412 (2nd Cir.), *cert. denied*, __U.S.__ (1996).

STATEMENT OF JURISDICTION

These respondents do not dispute the jurisdictional grounds set-forth by the petitioner.

STATEMENT OF THE CASE

The private Respondents are members of Respondent Park Avenue Synagogue, which meets in the home of Respondent Rabbi Yitzchok LeBlanc-Sternberg. His home was

originally situated within the corporate limits of the Town of Ramapo, New York. Subsequent to the incorporation of the Petitioner, the home became situated within the limits of the Village of Airmont.

Orthodox Judaism as determined by the Court of Appeals, requires "a relatively high number of local houses of worship. Daily prayer is required, and the saying of certain prayers and the reading from the Torah on the Sabbath require the presence of a minyan -- a quorum of ten males over the age of 13. Orthodox Jews are forbidden to use cars or other means of transportation during religious holidays and the weekly Sabbath; thus adherents are required to walk to their houses of worship." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 417 (2nd Cir.) *cert. denied*, __U.S.__ (1996).

Members of a local group, the Airmont Civic Association ("ACA"), were outraged by the Town of Ramapo's use of the Home Professional Office ("HPO") provisions of the Town's zoning code to accommodate the home worship needs of the Orthodox Jewish population in residential areas. A drive was launched by the ACA and its supporters to incorporate their own village, specifically "for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community." 67 F.3d 418.

The incorporation of Airmont as a Village was finalized in 1991, and a slate of officers who were ACA members was selected. These officers were opposed to home worship by Orthodox Jews. 67 F.3d 420-421. Five days after incorporation, Respondents filed the instant action alleging violation of the Free Exercise of Religion rights of respondents under the First Amendment, pursuant to 42 U.S.C. § 1983, and alleging violation of 42 U.S.C. § 3601 *et seq*. Subsequently, Respondent United States filed its action under the Fair Housing Act against Petitioner. Both actions were consolidated for trial.

In 1993 Airmont enacted a zoning code, which was identical to the Ramapo code, except for changes to the HPO section. The Airmont code prohibited "any activities that

come into a residential area so as to detract from the residential character of the area," and gave standing to any "aggrieved person" to request that the Board of Zoning Appeals interpret whether any disputed use was in violation of the section. 67 F.3d 420.

At trial, the jury found that Petitioner had violated the rights of these Respondents to the free exercise of their religion, under 42 U.S.C. § 1983, as well as their rights under 42 U.S.C. § 3601 *et seq.* However, in the trial of the Government action the district court found that the Village had taken no injurious action against the Orthodox citizens save only to pass the subject zoning code which the trial court found "arguably could be taken as a signal for a different interpretation" than the accommodating solution arrived at by the Town of Ramapo, but noted that it was equally likely that Airmont would avoid such an interpretation in light of the almost certain litigation that would follow. The trial court, in motions after verdict, struck down the jury's verdict on the motion of Petitioner under Fed. R. Civ. P. 50(b), incorporating its memorandum decision in the Government's case as a basis for its decision against these Respondents. 67 F.3d 423-424, 427-431.

On appeal, the Court of Appeals for the Second Circuit reversed the trial court.

The Court of Appeals reversed the trial court's finding that the jury verdict was unsupported by the evidence, and determined that there was ample evidence to support the existence of both a violation of the private respondents' Free Exercise rights and their rights under the Fair Housing Act. The court further determined that the jury verdict collaterally estopped the trial court from finding against the United States in its Fair Housing action, and it remanded both cases for further proceedings stating:

> . . . [T]he Private plaintiffs and the government were entitled to relief . . . The private plaintiff's action is remanded for the entry of judgment awarding

> those plaintiffs nominal damages and such injunctive and other relief as may be appropriate . . . The judgment dismissing the government's action . . . is reversed, and the matter is remanded for the entry of a declaratory judgment in favor of the government and for such injunctive and other relief as may be appropriate.
>
> 67 F.3d 435.

Following remand, the district court ordered the private respondents and the government respondent to file separate proposals for relief. Petitioner's response to the differing plans of relief from the private plaintiffs and the United States was a objection to any relief being granted. Petitioner did not submit any alternative plan of relief.

After briefing by the parties, the district court entered an Order and Judgment on April 25, 1996 and a supplemental Order on April 29. Pet. App. 1a-18a. The Orders were accompanied by a Memorandum Decision.

In its Order and Judgment the District Court, *inter-alia:* (1) declared the Petitioner to have violated the Fair Housing Act; (2) enjoined the Petitioners, its agents and those acting in concern with them, from (a) engaging in conduct having the "purpose or effect" of perpetuating or promoting religious discrimination, including any interpretations of the HPO provisions of the zoning code so as to "hinder, prevent, or prohibit persons from assembling in residential dwellings for the purposes of group prayers," (b) discriminating in matters of housing on the basis of religion; (c) interfering with persons who are exercising their rights to equal housing opportunity; or taking any action that denies housing on the basis of religion. *Id.*

The district court also ordered that the Petitioner modify its zoning code, most notably to: (a) provide a statement that the code was not to be used to hinder persons from

"peacefully assembling in residential dwellings solely for the purposes of individual or group prayer; " (b) include a provision that the presence of worshipers walking to or from a house to worship does not "constitute a change in the residential character of the neighborhood" (thus preventing the Petitioner from determining that Orthodox Jews who must walk to the Rabbi's home for prayer on the Sabbath change the "residential character" of the area, automatically disqualifying the home from being part of a Home Professional Office (HPO) under the "HPO" section of the code); (c) to allow group worship in homes located in residential areas as a matter of right; (d) to clarify that the lot size and other restrictions on a "place of worship" would only apply to free-standing synagogues or churches, and that such structures would be allowed in all residential areas, and (e) to delete the last two sentences of the HPO provision which gave broad standing to any "aggrieved person" who might want to challenge Orthodox home worship.

The private respondents requested relief that was similar to that requested by the government, but also requested the more severe remedy, in the alternative, of dissolution of the Petitioner, Village of Airmont.[1]

The district court, in a separate Order and Judgment, granted nominal damages to the private respondents, and ordered that "the plaintiffs (private respondents) request for injunctive relief is granted to the extent of that set forth in the Order and Judgment in the case of *United States v. Village of Airmont, et al.,* . . ." Resp. App. A-1.

Petitioner appealed, arguing that the relief was disproportionate, that the relief was not remedial, and that the district court usurped the role of local government regarding

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[1] This is pursuant to the district court's pretrial ruling that the Village's "incorporation could be declared null and void" if "discriminatory intent be found at the root of Airmont's incorporation." *LeBlanc-Sternberg v. Fletcher,* 763 F. Supp. 1246, 1252 (S.D.N.Y. 1991).

zoning decisions and thereby violated the principals of federalism.[2] The court of appeals rejected all of these arguments.

For the reasons stated herein, this Court should not grant the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT VIOLATE PRINCIPALS OF FEDERALISM

Petitioner makes the grand pronouncement that the ruling of the Second Circuit of Appeals on remedies in this case constitutes "federal tyranny over state and local issues." Pet. 6. This ignores the fact that the admittedly broad equitable relief granted by the trial court, and affirmed by the Court of Appeals, was for the purpose of remedying the tyranny exercised by the Petitioner over the most fundamental religious liberties of the private respondents.[3]

The record is clear as to the shocking nature of the hostility toward Orthodox Jews exhibited by the founders of the Petitioner, Village of Airmont, through the organization they used to push for incorporation of the Village - the Airmont Civic Association (ACA). The Court of Appeals, in the first appeal of this case, noted the "plethora of statements attribut-

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[2] These arguments, in varying degrees, are the focus of Petitioner's argument for the granting of certiorari, together with the contention that a purported division exists in the circuits on the interplay between local zoning power and the Free Exercise Clause. This latter argument was also advanced in the Petitioner's last failed attempt to argue for the granting of certiorari in this case. *Village of Airmont v. LeBlanc-Sternberg*, Case No. 95-1381. *Cert. denied* at __U.S.__ (1996). Interestingly, that argument under the First Amendment, although presented in the arguments set forth in the newest Petition for Writ of Certiorari, is not reflected in any of the questions presented for review. Pet., i.

[3] The Court of Appeals, in affirming the trial court grant of injunctive relief, noted that "[t]his was an egregious constitutional violation, calling for a commensurate injunctive remedy." Pet. App. 9a.

able to ACA leaders who became Village officials, expressing anti-Orthodox Jewish Sentiments." 67 F.3d 430. The push for incorporation, and a Village zoning code, was not motivated by a "legitimate nondiscriminatory reason but rather an animosity toward Orthodox Jews as a group." *Id.*

The principals of federalism are surely not designated to camouflage unconstitutional discrimination against religion.

Moreover, the remedies in this case conform with the considerations of federalism implicit in this Court's ruling in *Milliken v. Bradley,* 433 U.S. 267 (1977) and *Missouri v. Jenkins,* __U.S__ , 115 S. Ct. 2038, 132 L.Ed. 2d 63 (1995).

In *Milliken v. Bradley*, this Court, in reviewing the appropriateness of a federal court plan of remedy for discrimination in the schools of Detroit, cited several decisions from Courts of Appeal where the remedies before the Supreme Court had in fact been approved by the Court of Appeal from several Circuits. The Supreme Court stated:

> Our reference to these cases is not to be taken as necessarily approving holdings not reviewed by this Court. However, they demonstrate that the District Court in the case now before us *did not break new ground in approving the School Board's proposed plan.*

Milliken, at 433 U.S. 286-87. ("Milliken II") (emphasis added).

Although the Petitioner characterizes the District Court Order and Judgment as radical and unreasonably intrusive, it is clear that the remedies ordered by the trial court "did not break new ground," but follow the well-worn paths of prior court decisions.

Zoning codes can be ordered modified to eradicate discrimination. *Huntington Branch NAACP v. Town of Huntington,* 844 F.2d 926, 942 (2nd Cir.) *aff'd,* 488 U.S. 15 (1988).

Permanent injunctions prohibiting future acts of illegal discrimination have been applied in other cases. *United States v. City of Parma,* 504 F. Supp. 913, 918-26 (N.D. Ohio 1980).

The monitoring of, and imposition of notification requirements upon, offending units of government was approved in *Dunn v. New York State Dept. of Labor*, 47 F.3d 485, 488-89 (2nd Cir. 1995).

Like the remedy approved in *Milliken II,* the Order and Judgment of the trial court did not break new ground, but was a restrained solution that was compatible with traditional discrimination remedies.

Further, this Court under the rule of *Milliken II* should give due deference to the trial court's "proximity to local conditions" in its fashioning of remedies to reverse discrimination. *Milliken* at 433 U.S. 287, n. 18. This trial concerns an area not too far distance from White Plains, New York federal courthouse. This broad deference to the trial court's plan militates against the granting of the writ in this case.

In *Missouri v. Jenkins*, __ U.S. __, 115 S. Ct. 2038, 132 L. Ed. 2d. 63 (1995) the Supreme Court reaffirmed its three-part test, originated under *Milliken II,* to guide district courts in the exercise of their remedial authority:

> In the first place, like other equitable remedies, the nature of desegregation remedy is to be determined by the nature and scope of the constitutional violation. (citations omitted).

132 L. Ed. 2d 80. Stated in other terms, the remedy should strike at the "most important indicia of [the discrimination in question]. " *Id.* In school desegregation cases the Court had determined that such "indicia" included student assignments, faculty, staff, transportation, extracurricular activities and facilities. *Id.*

In this case, the most important indicia of discrimination was determined by the Second Circuit Court of Appeals to be the zoning code itself: "It is a fair inference that the jury viewed the Village's enactment of that code, with provisions facilitating rejection of HPO applications, as an act that was designed to limit the number of home synagogues and that was thus about to make dwellings unavailable to Orthodox Jews because of their religion." *Sternberg,* at 67 F.3d 428. Thus it was appropriate that the District Court configure its remedy around the zoning code, and the ability of persons to worship in homes.

> Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' (citations omitted).

Missouri, 132 L. Ed. 2d 80. The remedy in this case is precisely defined, the notice requirements are time-limited to a threshold of 5 years, and the plan restores the Respondents to a situation where religion cannot be used as the motivation behind zoning restrictions against group home worship.

Thus, the remedy in this case can be easily distinguished from that in the *Missouri* case where the remedy struck down was based on a "rationale [that] is not susceptible to any objective limitation." *Id.* at 87.

Third, this Court has required federal courts, in fashioning remedies, to "take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 80.

In this case the District Court was faced with a local governmental party that is reluctant, even at this late hour, to admit any wrongdoing, or to take responsibility for past religious discrimination. It is hard to envision a remedy that could have better accommodated the self-rule interests of the

Petitioner, while still accomplishing any remedial purpose at all, than that granted in this case. This is particularly true where, as here, the Petitioner did not submit to the trial court a carefully constructed alternative plan to those proposed by the respondents. Moreover, it is difficult to justify the attention of this Court to an increased accommodation to the interests of Petitioner where it argued to the trial court that the only appropriate remedy for the Respondents was to give them no real remedy at all.

II. THERE WAS ADEQUATE PROOF OF HARM UPON WHICH TO BASE THE EQUITABLE RELIEF AWARDED

Petitioner argues that review is necessary to cure "extraordinary" relief, which "dramatically" changes a local zoning code, despite the fact that, as claimed by Petitioner, "Respondents never claimed to be harmed by the Code." Pet. 10.

Such statements ignore the record. Respondents have consistently claimed to have suffered a constitutional and Fair Housing Act injury by reason of the actions of the Petitioner.[4] The Court of Appeals found that the zoning code was not only passed with a anti-religious animus, 67 F.3d 430, but also determined that the evidence showed that "the zoning ordinance will likely be applied in a discriminatory manner . . ." 67 F.3d 425. An ample evidentiary showing of harm is reflected by the record in this case.

A trial court's judgment on matters of relief where they are designed to cure a constitutional violation are owed defer-

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[4] The fact that the zoning code in this case was never enforced against the respondents is not dispositive of whether they suffered constitutional harm. This Court struck down a local law that targeted a religious group even though the law had never been enforced, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, __ U.S. __, 113 S.Ct. 2217 (1993).

ence on review. *Louisiana v. United States,* 380 U.S. 145, 154 (1965).

The extent of the violation will, to a great degree, determine the extent and scope of the remedy awarded. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 16 (1971).

These principals, inherently ones of flexibility and proportionality, when applied to a record where intentional discrimination has been determined to exist, make this a case inappropriate for review by this Court.

Further, while Petitioner cites cases where overly sweeping remedies were found excessive because less intrusive relief was available (Pet. 12), Petitioner made no argument to the trial court in this case as to what lesser injunctive relief would be appropriate, nor did they suggest their own alternate zoning modification plan.

The Court of Appeals noted that "there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future," and that future violations were "likely." Pet. App. 11a.

On this kind of record, there is no basis for granting the Writ requested by Petitioner.

III. NO DIVISION EXISTS IN THE CIRCUITS REGARDING INTENTIONAL DISCRIMINATION THAT VIOLATES THE FREE EXECISE CLAUSE

Petitioner pronounces a division among the Circuits regarding the manner of resolving conflicts between local zoning regulations and religious activities restricted or prohibited by those regulations. While it is correct that some of the federal Circuits have adopted differing standards regarding the resolution of those kinds of conflicts, whatever their differences may be, such divisions are beside the point in this case. There is no division, "deep" or otherwise, concerning the invalidity of official government action under the Free Exercise Clause of the First Amendment when that action has, *as its object*, the targeting of religious belief or practice for dis-

criminatory treatment. The cases cited by Petitioner do not indicate otherwise.

In *Lakewood v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied* 464 U.S. 815 (1983) the subject zoning code effectively prohibited the construction of new churches in all residential areas, and limited such new construction to ten percent of the area of the city. *Id.*, 699 F.2d 307. However, as the Court emphasized:

> [T]he record does not indicate that the Congregation may not purchase an *existing* church or worship in any building in the remaining ninety percent of the City.

Id. (emphasis added). Thus, the effect of the zoning code was not to lock-out all religious worship or any particular mode of religious practice. But even more importantly, the Court noted that there was no contention of a discriminatory animus behind the zoning provision:

> Contrary to the Congregation's arguments, this case does not present a situation similar to *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981). In *Keego Harbor*, a zoning ordinance effectively excluded adult movie theaters from the city by setting severe spacing limitations. This court found the ordinance unconstitutional because the purpose and effect were to eliminate from the city the exercise of a first amendment right.

Id. (emphasis added).

Thus, the law in the Sixth Circuit supports that position that when the purpose and effect of zoning is to limit or exclude activities protected by the First Amendment, the regulation must satisfy strict scrutiny (i.e., *Keego Harbor),* but where the zoning regulation has no such purpose or effect

(i.e., where it is truly a "neutral law" of "general applicability," as in *Lakewood)* there is no duty to accommodate Free Exercise activities, particularly where "the activity has no religious or ritualistic significance for the . . ." religious objectors. *Lakewood,* 699 F.2d 306.

While Petitioner stresses the language in *Lakewood* that concluded that the effect of the zoning was simply to make the plaintiff's religious practice "more expensive" (Pet., 14), a circumstance not *per se* violative of Free Exercise, Petitioner ignores the broader context of that rule which finds its source in *Braunfeld v. Brown*, 366 U.S. 599 (1961). As the Court in *Lakewood,* points out:

> [T]he incidental economic burden [placed on the plaintiffs in Braunfield] was not unconstitutional because neither the *purpose* nor the *effect* of the law was to impede religious observation or to discriminate among religions.

699 F.2d 306 (emphasis added). In the instant case the Village of Airmont was incorporated for the express purpose of passing zoning restrictions, the *purpose* and *effect* of which was to discriminate against Orthodox Jewish practices. The enormous and impractical cost of building a free-standing synagogue on two acres of land was not an incidental financial effect on Respondents because of Airmont's "neutral" and "general applicable" zoning code; on the contrary, the enormous cost was the very tool used by the Village founders to *intentionally* discourage a disfavored religious group from moving in.

When a municipality purposefully plans to impose financial burdens on a disfavored religious practice as a means of discriminating against it, the Free Exercise Clause protects that religious practice, and will sustain the offending law "only in rare cases." *LeBlanc-Sternberg,* 67 F.3d 426, quoting from Church of the *Lukumi Bahalu Aye. Inc., v. City of*

Hialeah, 508, U.S. __, 113 S.Ct. 2217, 2233 (1992). "[A] law targeting religious beliefs as such is never permissible." *Id.*, 113 S.Ct. at 2227.

The facts in *Lakewood,* did not include the intentional targeting of religion, as is the situation in the instant case, and nothing in *Lakewood,* is inconsistent with the reasoning of this Court in *Lukumi Babalu* some ten years later.

Similarly, Petitioner's citation to *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (Pet., 15), is of no avail in establishing a "division" among the circuits relevant to this case.

Petitioners contention that *Grosz* contains "nearly identical facts" (Pet., 15) is simply incorrect. As was the case in *Lakewood,* the *Grosz* facts did not involve a situation where a municipality intentionally targeted a religious practice for discrimination through its zoning code. Indeed, in *Grosz*, the court stated: "No one contends that zoning laws are based upon disagreement with religious tenets, or are aimed at impeding religion." 721 F.2d 738.

In the instant case, however, the Second Circuit specifically found that Petitioner passed its zoning code as an effort aimed at impeding the religious practices of Orthodox Jews. Further, the *Grosz* case was decided almost a decade before *Lukumi Babalu* and, therefore, any perceived division arising from the *Grosz* decision (or the *Lakewood* decision for that matter) is of dubious value as a basis for this Court to grant certiorari.

While the reasoning in *Grosz* still has influence in the Eleventh Circuit, that Circuit has itself distinguished *Grosz* from the *Lukumi Babalu* paradigm on the basis that the *Lukumi Babalu* case involved "a local law targeting" religious practice for discrimination. *First Assembly of God v. Collier County, Fla.,* 20 F.3d 419, 423 (11th Cir. 1994).

In *First Assembly of God*, the plaintiffs argued that the *Grosz* reasoning was no longer valid law because the *Grosz* reasoning was the basis of the trial court's decision in *Lukumi*

Babalu reasoning which was rejected by this Court. The Eleventh Circuit has concluded that, "[t]he Supreme Court reversed the application of *Grosz*, not the holding of *Grosz* itself or the reasoning behind it.," Id. 423 n.4.

Respondents respectfully submit that, whatever problems there may be with the reasoning used in *Grosz,* that reasoning is simply not applicable to a case of intentional discrimination, as is the case at bar.

Petitioner's reliance on *Islamic Center of Mississippi, Inc. v. City of Starkville, Miss.,* 840 F.2d 293 (5th Cir. 1988) is misplaced, since *Islamic Center* handily distinguishes both *Lakewood* and *Grosz* from the facts in that case. 840 F.2d 301-303.

Lastly, even assuming *arguendo* a division in the Eleventh, Sixth, Fifth and Second Circuits, there is another reason why such a division would be ultimately illusory. The decisions in *Lakewood, Grosz* and *Islamic Center* all pre-date this Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Lukumi Bahalu*. How the Eleventh or Sixth Circuits would decide cases whose facts implicate *Smith,* or *Lukumi Babalu,* is unknown, and undermines the argument made by Petitioner.

CONCLUSION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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April 4, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER AND JUDGMENT
91 Civ. 2550 (GLG)

Rabbi Yitzchok LeBlanc-Sternberg, Chanie LeBlanc-Sternberg, Fred Walfish, Lewis Kamman, Park Avenue Synagogue, Inc.,

Plaintiffs,

– against –

Robert Fletcher & Nick Vertullo, Raymond Kane, Maureen Kendrick, and John C. Layne, Individually and in their capacity as Trustees of the Village of Airmont,

Defendants.

This case having been remanded by the Second Circuit Court of Appeals for the entry of judgment awarding the plaintiffs nominal damages and such injunctive and other relief as may be appropriate against the Village of Airmont, but having affirmed the judgment dismissing the private plaintiffs' claims against the individual defendants, it is ORDERED:

(1) that the Clerk shall enter judgment for each of the plaintiffs in the amount of $1.00 against the Village of Airmont; and

(2) that the plaintiffs' request for injunctive relief is granted to the extent of that set forth in the Order and Judgment in the case *of United States v. Village of Airmont, et al.*, 91 Civ. 8453 (GLG).

So Ordered.

Dated: April 25, 1996
White Plains, N.Y.

/s/_____
Gerald L. Goettel
U.S.D.J.

Supreme Court, U.S.
FILED
MAY 5 1997
CLERK

No. 96-1397

In the Supreme Court of the United States

OCTOBER TERM, 1996

VILLAGE OF AIRMONT, PETITIONER

v.

YITZCHOK LEBLANC-STERNBERG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the validity of the terms of the injunction entered by the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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YITZCHOK LEBLANC-STERNBERG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's entry of injunctive relief (App., *infra*, 1a-10a) is unpublished, but the decision is noted at 104 F.3d 355 (Table).[1] The earlier opinion of the court of appeals reversing the district court's original dismissal of the case and denial of injunctive relief is reported at 67 F.3d 412. The opinion of the district court on remand (App., *infra*, 11a-29a) is reported at

[1] Because the court of appeals' opinion as reproduced in the appendix to the petition (Pet. App. 1a-11a) contains typographical errors that omit several lines of the opinion, that opinion is included in the appendix to this brief in opposition.

922 F. Supp. 959,[2] and its order entering injunctive relief on remand (Pet. App. 12a-16a) is reported at 925 F. Supp. 160. The district court's supplemental order (Pet. App. 17a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1996. The petition for a writ of certiorari was filed on March 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This litigation arose out of the incorporation of the Village of Airmont, New York, in 1991. Prior to incorporation, the Airmont community was an unincorporated area of the Town of Ramapo, New York. During the 1980s, the number of Orthodox Jews (including Hasidic Jews, a subgroup of Orthodox Jewry) residing in Ramapo increased dramatically. *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 417 (2d Cir. 1995). In the mid-1980s, Ramapo accommodated the needs of Orthodox Jews for a place of worship near their homes by relying on a provision of its zoning code regarding "home professional office[s]," which permitted members of certain "learned professions," including clergy, to operate offices within their homes, subject to certain restrictions. *Id.* at 418.[3]

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[2] Because the appendix to the petition does not include the opinion of the district court, that opinion is included in the appendix to this brief in opposition.

[3] Orthodox Jews cannot travel substantial distances to a place of worship for services or prayer because the tenets of Orthodox Judaism do not permit adherents to travel by automobile or other mechanical means of transportation on the Sabbath or on certain religious holidays. *LeBlanc-Sternberg*, 67 F.3d at 417. Strict observance by Orthodox Jews requires daily

Ramapo interpreted the zoning code provision to permit rabbis to conduct worship services in their homes, subject to limitations on the number of persons who could gather at any given time. *Ibid.*

In the Airmont area of Ramapo, a group of residents formed the Airmont Civic Association (ACA) and began efforts to incorporate Airmont as a village "because some of its members felt that the Town of Ramapo was adopting zoning measures unduly favorable to Hasidic Jews." App., *infra*, 13a. As an incorporated village, separate from Ramapo, Airmont would be able to have its own zoning code. *LeBlanc-Sternberg*, 67 F.3d at 418. The ACA sought incorporation as a village with the expressed intent of keeping Orthodox and Hasidic Jews out of the Airmont community. *Id.* at 418-419. A referendum on incorporation of Airmont was held on January 30, 1989, and the vote was in favor of incorporation by a margin of 3 to 1. *Id.* at 419.[4]

ACA members went before the Ramapo Planning Board to oppose respondent Rabbi LeBlanc-Sternberg's application to conduct worship services in his home. In the course of doing so, they expressed anti-Orthodox sentiments and stated that Orthodox

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worship, and certain prayers may be said only if a "minyan," *i.e.*, a group of ten males at or above the age of thirteen, is present. *Ibid.* As a consequence, it is important for Orthodox Jews to live within walking distance of a place where they can congregate for worship. *Ibid.*

[4] Formal incorporation was delayed, however, by litigation in state court challenging the manner in which the referendum was conducted. Meanwhile, the ACA continued to oppose actions by the Town of Ramapo to approve zoning variances that would allow Orthodox Jewish houses of worship. *LeBlanc-Sternberg*, 67 F.3d at 419.

Jews should not have moved into the area, since they knew when they did so that there were no houses of worship. *LeBlanc-Sternberg*, 67 F.3d at 420. Ramapo initially denied the application, then twice approved it, but the ACA financed two successful state court challenges to the approvals. *Ibid.* Ramapo approved the application for a third time, including certain restrictions on the number of congregants and restricting the home worship to Jewish holidays and the Sabbath. *Ibid.* By then, the Village of Airmont was incorporated, and it decided not to pursue a third state court challenge. A village trustee and former ACA board member stated that the Village did not need to pursue another state court challenge since "there are other ways we can harass them." *Ibid.*

b. The Village of Airmont was formally incorporated on April 10, 1991. *LeBlanc-Sternberg*, 67 F.3d at 419. On April 12, 1991, the private respondents, a group of Orthodox Jewish residents of the Village of Airmont including Rabbi LeBlanc-Sternberg, filed a complaint in the United States District Court for the Southern District of New York against the Village, the ACA, Ramapo and several leaders of the incorporation movement, claiming that the incorporation of the Village had been undertaken for the purpose of excluding Orthodox Jews, in violation of various federal laws, including the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, and the First Amendment. They sought damages and injunctive relief, and moved to enjoin preliminarily the election of the Village mayor and board of trustees that was scheduled for May 16, 1991. *LeBlanc-Sternberg*, 67 F.3d at 419. The district court denied an injunction on the ground that respondents had failed to establish irreparable harm. *LeBlanc-Sternberg* v. *Fletcher*, 763

F. Supp. 1246, 1250-1252 (S.D.N.Y. 1991). Shortly thereafter, the ACA's slate of candidates was elected and took office as the Village Mayor and the members of its Board of Trustees. *LeBlanc-Sternberg*, 67 F.3d at 419.

c. On December 17, 1991, the United States filed suit against the ACA, the Village, and the Village trustees in their official capacities, alleging that the incorporation of Airmont had been accomplished "for the purpose of excluding Orthodox Jews" from the Village by, *inter alia*, imposing burdensome zoning and other restrictions upon Orthodox Jewish places of worship in the Village, in violation of the FHA. The United States sought declaratory and injunctive relief. *LeBlanc-Sternberg*, 67 F.3d at 419.

In January, 1993, the Village of Airmont adopted its own zoning code. *LeBlanc-Sternberg*, 67 F.3d at 420. The code contained several modifications of the "home professional office" provision of the Ramapo zoning code and stated the Village's intention that the provision "not generate activities that come into a residential area so as to detract from the residential character of the area." *Ibid.* The Village appointed a board of appeals and a planning board to interpret and apply the code and appointed, as one of the board members, an ACA member who had stated that most persons were opposed to home houses of worship and who had participated in the surveillance of Orthodox Jewish homes at prayer time. *Id.* at 421. The mayor and three of the four trustees who adopted the zoning code all "testified at trial that they were opposed to the Ramapo-type interpretation of the [home professional office] provision to allow worship services in the homes of clergy." *Ibid.* Respondents contended that, in light of the circumstances surrounding the

adoption of the zoning provision, the interpretation it would be given was a foregone conclusion. See *ibid.*

d. The two lawsuits were consolidated and proceeded to trial.[5] The damages claims by the private respondents were tried to a jury; the government's suit was tried to the court. *LeBlanc-Sternberg*, 67 F.3d at 419.[6] On December 13, 1993, after seven weeks of trial and a week of deliberations, the jury returned a verdict against the Village, finding that it had violated private respondents' rights under the FHA and had conspired to violate their rights under the First Amendment. *Id.* at 421-422. The jury awarded no damages. *Id.* at 422. In addition, the jury returned a verdict in favor of the individual defendants. *Ibid.*

Two days after the jury verdict, the district court dismissed the government's suit. *LeBlanc-Sternberg*, 67 F.3d at 422; *United States* v. *Village of Airmont*, 839 F. Supp. 1054 (S.D.N.Y. 1993). The court found that there was no basis for injunctive relief because the Village of Airmont had not taken any actions that violated the rights of Orthodox Jews in that, since incorporation, it only had enacted the zoning code and had not interpreted it. The court stated that, although the differences between the Airmont code and the Ramapo code "arguably could be taken as

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[5] On December 24, 1991, the district court had denied a motion to dismiss the private suit, rejecting, *inter alia*, the challenge to the private respondents' standing, to the justiciability of their claims, and to their statement of a cause of action. *LeBlanc-Sternberg* v. *Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991).

[6] Claims against some original defendants were settled or dismissed prior to trial, and a default judgment was entered against the ACA. *LeBlanc-Sternberg*, 67 F.3d at 421.

a signal for a different interpretation," the Village "might not" interpret its code to prevent the use of home houses of worship by Orthodox and Hasidic rabbis for worship services. *LeBlanc-Sternberg*, 67 F.3d at 422; *Airmont*, 839 F. Supp. at 1063-1064.

The court dismissed the case notwithstanding its acknowledgment that, "[v]iewing the evidence in the light most favorable to the Government, we can foresee that the [Airmont] Planning Board and the Zoning Board of Appeals (to the extent the matter might be submitted to it) will not adopt the Ramapo interpretation of the home professional office exception." *Airmont*, 839 F. Supp. at 1064. The court also recognized that the absence of actions against the Orthodox and Hasidic Jews in Airmont by the Village or the trustees since the incorporation of the Village could have been caused by the pendency of the instant litigation. *Ibid.* The court concluded that, "if there is any action taken in the future which violates their rights, the United States Government and other plaintiffs will not be timorous about suing. Consequently, we see no basis or need for injunctive relief." *Ibid.* The court believed that injunctive relief, as requested by the United States, to prohibit petitioners from denying persons their constitutional rights was "unnecessary since it would be enjoining acts which are already illegal." *Id.* at 1065.

The district court also denied private respondents any injunctive relief. *LeBlanc-Sternberg*, 67 F.3d at 423. In addition, three months after trial, on March 16, 1994, the district court granted petitioner's motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). *LeBlanc-Sternberg* v. *Fletcher*, 846 F. Supp. 294 (S.D.N.Y. 1994). The court found the jury verdict to be inconsistent because the

jury had found that the Village of Airmont had violated the FHA and conspired to violate the constitutional rights of certain individuals to engage in the free exercise of religion and speech, but had not awarded any damages. *Id.* at 295. The court incorporated in its findings the facts it had found and the reasoning set forth in its decision dismissing the government's suit. *Ibid.* The court also rejected the argument that petitioner's actions had a chilling effect on the respondents' First Amendment rights and concluded that, because the private respondents already had their zoning permits, the worst situation they would face, if the Airmont code were to be interpreted differently from the Ramapo code, would be as a non-conforming use. *Id.* at 296.

2. The court of appeals reversed the dismissal of the claims against petitioner, the Village. *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995).[7] The court remanded for an award of nominal damages and injunctive relief in the private suit and for declaratory and injunctive relief in the United States' action. *Id.* at 435.

The court held that "the evidence was sufficient to establish that Airmont violated the private [respondents'] rights under the Fair Housing Act and the First Amendment; that the district court was not entitled to set aside the jury's verdict against the Village on those claims on the basis of the court's own findings in the government's action; that in light of the established violation of their rights, the private

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[7] The court affirmed the judgment dismissing the private respondents' suit against the individual defendants and dismissed the cross-appeal of two of the individual defendants as moot. *LeBlanc-Sternberg*, 67 F.3d at 432-433, 435.

[respondents] were entitled to an award of nominal damages; that the jury's verdict against the Village constituted collateral estoppel that required the court to find that the government had established a violation by the Village; and that in ruling that injunctive relief was not appropriate, the court failed to apply pertinent [Fair Housing Act] principles." *LeBlanc-Sternberg*, 67 F.3d at 424. The court found that, when viewed in the light most favorable to the private respondents, "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with ACA." *Id.* at 431. Accordingly, private respondents had established the Village of Airmont's liability on their claims under the FHA, the First Amendment, and 42 U.S.C. 1983 and 1985(3), entitling them to nominal damages. 67 F.3d at 429-431. The court ordered the district court to consider whether injunctive relief in favor of private respondents was appropriate in light of the jury's verdict. *Id.* at 432.

The court of appeals held that the United States was entitled to a declaratory judgment on its FHA claim. *LeBlanc-Sternberg*, 67 F.3d at 433-435. In addition, the court held that the United States was entitled to an injunction "prohibiting the application of the Airmont zoning code in the discriminatory manner found to be predictable from the evidence in this record." *Id.* at 434.

3. On June 24, 1996, the Court denied a petition for a writ of certiorari to review the court of appeals' decision. *Village of Airmont* v. *LeBlanc-Sternberg*, 116 S. Ct. 2546.

4. On remand, the district court entered injunctive relief against the Village in both cases, awarded the private respondents nominal damages, and entered a declaratory judgment. App., *infra*, 20a-25a, 27a-28a; Pet. App. 12a. The court also entered an injunction forbidding "the Village and its officers, employees, agents, successors, and assigns from promoting religious discrimination; from denying equal opportunity to religion by use, interpretation, or enforcement of the zoning code in such a manner that it prevents home worship; from discriminating because of religion or interfering with the free exercise of religion in connection with housing; and from taking any action that limits the availability of housing on the basis of religion." App., *infra*, 23a-24a; Pet. App. 12a-13a. Specifically, the court directed that the Airmont zoning code be revised "so that it will not be construed to prevent home worship, or to prevent persons from walking to and from religious services at such places of worship, or to prevent home worship services on any day in all residential zones." App., *infra*, 24a. The court ordered certain other conforming revisions to the code. *Ibid.*; Pet. App. 13a-15a. In addition, the court ordered that, for a period of five years, the Village must maintain and make available to the United States all applications for residential houses of worship and records indicating the disposition of each such application; it must provide opposing counsel with advance notice of all Village planning board and zoning board meetings in which any application relating to religious worship will be considered; and it must notify government counsel of any proposed changes in the Village's zoning

ordinances relating to religious worship. Pet. App. 15a-18a.[8]

5. The court of appeals affirmed. App., *infra*, 1a-10a. It ruled that the district court's exercise of injunctive relief passed muster under *Milliken* v. *Bradley*, 433 U.S. 267, 280-282 (1977), in that the remedy (1) was commensurate to the Village's "egregious constitutional violation" (*i.e.*, "passing a zoning code based on religious animus") and to the predictability of further constitutional violations by future discriminatory enforcement of the code, because the remedy "cured the past constitutional violation and obviated the threat of future constitutional violations" (App., *infra*, 7a-8a); (2) was remedial in nature because the injunction "ensured that rights to free exercise of religion were unencumbered, and the constant threat of limitation of those rights was lifted" (*id.* at 9a); and (3) was not overly intrusive on local authority because "there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future" (an occurrence that the court of appeals had ruled was "likely") and the injunction "was necessary to ensure that the Village complied with the mandate of the FHA" (*id.* at 10a).

ARGUMENT

1. Petitioner contends (Pet. 5-8) that the court of appeals disregarded constitutional precedent that the federal government is a government of limited powers and that the court erred by permitting intervention

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[8] The district court denied the request by private respondents that it dissolve the Village. App., *infra*, 25a-27a.

into the uniquely local issue of zoning, a matter which is better left to local governments.

The court of appeals correctly upheld the injunctive relief ordered by the district court. As the court of appeals noted, a district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." App., *infra*, 7a (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). In the instant case, the jury had implicitly found that the Airmont zoning code was motivated by discriminatory animus against Orthodox and Hasidic Jews and that it would be interpreted to restrict the use of home synagogues, "thereby deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods." *LeBlanc-Sternberg*, 67 F.3d at 429; see also *id.* at 428, 431. Thus, the district court correctly fashioned "a remedy that both cured the past constitutional violation and obviated the threat of future constitutional violations." App., *infra*, 8a.

Ordinarily, local governments enjoy considerable discretion in making land-use decisions. Where, however, a municipality's zoning code was enacted in violation of federal constitutional or statutory requirements, as the court of appeals found was the case here, the municipality is not immune from the remedial power of a federal court. And where, as here, the violation includes the threat of future application of the invidiously adopted zoning code in a discriminatory manner, the court's authority permits it to order revisions that will prevent it from being so construed and applied. As the court of appeals recognized (App., *infra*, 10a), "the Village's history and its disregard of this Court's clear holding that it

was in violation of the FHA" gave no indication that it would make the changes necessary to ensure compliance with federal law. In similar circumstances, federal courts have affirmed district court orders striking down and revising municipal legislation where necessary to cure a constitutional violation and to ensure against future violations. See *id.* at 7a (citing *United States* v. *City of Parma*, 661 F.2d 562, 578 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926 (2d Cir.), aff'd, 488 U.S. 15 (1988) (per curiam)). Indeed, in *Huntington*, where the town was found to have violated the FHA, this Court affirmed a court of appeals' judgment that directed the town to strike from its zoning code "the restriction of private multifamily housing projects to the urban renewal area and ordered the town to rezone the project site to R-3M." 488 U.S. at 18. See also *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (invalidating a city ordinance barring persons because of their race from acquiring real property in a residential area). Here, the district court took a less drastic approach by ordering revision of the zoning code.

2. Petitioner contends (Pet. 9-13) that the injunctive relief exceeded the court's remedial authority because there had been no injury to the private respondents' right to pray.

Petitioner's argument constitutes, in essence, a reprise of one of the arguments presented in its earlier unsuccessful petition for a writ of certiorari in this case. Compare Pet. 9 (respondents have "sustained no wrong that could be remedied by an injunction") with Pet. at 10-19 in *Village of Airmont* v. *LeBlanc-Sternberg*, cert. denied, 116

S. Ct. 2546 (1996) (No. 95-1381) (arguing that no ripe controversy between the United States and the Village existed because there was no past or potential future injury).

The injunctive relief entered in this case was authorized under the well-established principle that a plaintiff need not "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923). As the court of appeals recognized (*LeBlanc-Sternberg*, 67 F.3d at 425), the FHA provides standing to a person who believes he "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i)(2). That provision is premised on the long-standing doctrine that "a suit for an injunction deals primarily, not with past violations, but with threatened future ones; * * * an injunction may issue to prevent future wrong, although no right has yet been violated." *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928); accord *Farmer* v. *Brennan*, 511 U.S. 825, 845 (1994).

The trial evidence demonstrated the necessity for judicial intervention in this case. The court of appeals had held that the Village had violated the FHA "by passing a zoning code based on religious animus." App., *infra*, 7a. It also expressly had found that it was " 'predictable from the evidence in this record' that the Village would violate the Constitution by enforcing the code in the future in a discriminatory manner." *Id.* at 7a-8a. (quoting *LeBlanc-Sternberg*, 67 F.3d at 434). The incorporation of the Village of Airmont, for the expressed purpose of enacting a zoning code to exclude Orthodox Jews' home houses of worship, and the enactment of the Airmont zoning ordinance itself, were designed to

chill the exercise of both First Amendment and FHA rights. As has been often recognized, a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.).

3. Petitioner contends (Pet. 13-17) that there is a conflict among the courts of appeals on the question whether the First Amendment requires an accommodation for religious worship that is burdened by local zoning decisions. Petitioner's argument is virtually identical to one of the arguments advanced in its earlier unsuccessful petition for a writ of certiorari in this case. Compare Pet. 13-17 with Pet. at 6-10 in *Village of Airmont* v. *LeBlanc-Sternberg*, cert. denied, 116 S. Ct. 2546 (1996) (No. 95-1381).

Neither of the cases cited by petitioners (Pet. 13-16) as purportedly in conflict with the decision below, *i.e.*, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983), and *Grosz* v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), involved allegations—let alone, as here, findings—of intentional discrimination. The plaintiffs there did not claim that the zoning laws were intended to impede the practice of religion. Both of those cases involved application of neutral laws of general applicability which, under *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi*

Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993).[9]

Lakewood involved a zoning ordinance that prohibited the building of a church in a residential neighborhood. As applied to the Congregation of Jehovah's Witnesses, the ordinance resulted in the Congregation's not being able to build a new church on a lot that it owned. That location had "no religious or ritualistic significance" to the plaintiffs and the zoning ordinance did "not prevent the Congregation from practicing its faith" elsewhere. *Lakewood*, 699 F.2d at 306-307. The court emphasized that the ordinance did not have the purpose or effect of prohibiting the Jehovah's Witnesses or any other faith from practicing its religion. *Ibid.* The ordinance "simply regulate[d] a secular activity and, as applied to the [Congregation], operate[d] so as to make the practice of their religious beliefs more expensive." *Id.* at 307 (quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (opinion of Warren, C.J.) (emphasis omitted). The court in *Lakewood* contrasted the situation there from that in *Keego Harbor Company*

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[9] This case does not involve a claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which was enacted in response to this Court's decision in *Smith*. RFRA restores the compelling interest test, as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), for claims involving governmental action that substantially burdens a person's exercise of religion, even if the burden results from a neutral rule of general applicability. Therefore, there is no reason to hold this petition pending the disposition of *City of Boerne* v. *Flores*, No. 95-2074 (argued Feb. 19, 1997), which presents the question whether RFRA is a constitutional exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment.

v. *City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981), in which a zoning ordinance had been declared unconstitutional because "its purpose and effect were to eliminate from the city the exercise of a first amendment right." *Lakewood*, 699 F.2d at 307.

Similarly, in *Grosz*, there was no contention that the zoning laws at issue were "based upon disagreement with religious tenets or practices, or [were] aimed at impeding religion," 721 F.2d at 733, and it was uncontroverted that "the law has both secular purpose and effect," *id.* at 738. There was no religious necessity that the religious services at issue in that case be held in the particular location at issue; the Eleventh Circuit found that the home of the rabbi in which the religious services were conducted was within four blocks of a district in which publicly attended religious services were allowed, and that such services were allowed in one-half of the city's territory. *Id.* at 731, 739.

More recently, the Eleventh Circuit in *First Assembly of God of Naples, Florida, Inc.* v. *Collier County*, 20 F.3d 419, modified on other grounds on denial of rehearing, 27 F.3d 526 (1994), cert. denied, 513 U.S. 1080 (1995), noted the special analysis that is required when a zoning ordinance singles out a particular religious practice for unfavorable treatment. The court contrasted the situation in *Grosz* from that in *Lukumi Babalu Aye*, where the local law was held to violate the Free Exercise Clause because it "target[ed] the use of animal sacrifice for religious purposes." *Id.* at 423. In both *Grosz* and *First Assembly of God*, the challenged enactments were found to be of general applicability and not motivated by hostility toward religion, so that the compel-

ling interest analysis applied in *Lukumi* was not applicable. *Id.* at 424.[10]

Unlike *Lakewood* and *Grosz*, the instant case involves purposeful discrimination based upon religion. The Village of Airmont was incorporated for the purpose of deterring Orthodox Jews from residing in Airmont in violation of the FHA, and it conspired to impede the private respondents' exercise of their First Amendment free exercise rights. *LeBlanc-Sternberg*, 67 F.3d at 429, 431. The court of appeals' decision in this case is consistent with the only decision cited by petitioner (Pet. 16) that involved purposeful discrimination against a particular religious group, *i.e.*, *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988). In *Islamic Center*, the court concluded that the city "favored Christian churches over Muslim mosques" by granting exemptions from its zoning ordinance for every Christian denomination that had applied, and denying an exemption only to the Islamic group. *Id.* at 294, 297, 302-303. There also was evidence that the adherents of the particular religious faith needed a place to worship near their homes because travel by automobile was unavailable, as well as evidence that the governmental entity applied a stricter standard to the needs of non-Christian religious organizations. *Ibid.*

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[10] In an amendment to its decision, added in the course of denying a petition for rehearing and suggestion of rehearing *en banc*, the *First Assembly of God* court noted that RFRA might be applicable to the claims in that case. It declined to address that issue, however, because it had not been raised by either party. *First Assembly of God of Naples, Florida, Inc.* v. *Collier County*, 27 F.3d 526 (11th Cir. 1994), cert. denied, 513 U.S. 1080 (1995). See note 9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1997

APPENDIX A

[UNPUBLISHED]

[Notice: This Summary Order may not be cited as precedential authority, but may be called to the attention of the Court in a subsequent stage of this case, or in any case for purposes of collateral estoppel or res judicata. See Second Circuit Rule 0.23]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6149

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., PLAINTIFFS-APPELLEES

v.

ROBERT FLETCHER, NICK VERTULLO, RAYMOND KANE, MAUREEN KENDRICK, JOHN C. LAYNE, INDIVIDUALLY AND IN THEIR CAPACITIES AS TRUSTEES OF THE VILLAGE OF AIRMONT AND AS OFFICERS AND BOARD MEMBERS OF THE AIRMONT CIVIC ASSOC., AND THE VILLAGE OF AIRMONT, DEFENDANTS-APPELLANTS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO, IN HIS CAPACITY AS MAYOR OF THE VILLAGE OF AIRMONT, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA, AND RONALD SABO, IN THEIR CAPACITIES AS TRUSTEES OF THE VILLAGE OF AIRMONT, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of New York (Goettel, J.)

[Filed: Dec. 6, 1996]

Present: OAKES, McLAUGHLIN and CABRANES, Circuit Judges.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

The Government filed an action under the Fair Housing Act, 42 U.S.C. § 3601 et seq. ("FHA"), in 1991, against the Village of Airmont ("Village"), alleging that the Village was formed for the purpose of excluding Orthodox Jews by, among other things, imposing restrictions on Jewish forms of residential worship. Specifically, the Airmont Civic Association ("ACA"), an organization whose purpose was the incorporation of the Village, was to enact a zoning ordinance completely preventing worship in homes—a primary method of Orthodox Jewish worship. At roughly the same time, a private group of rabbis initiated an action, which was consolidated with the government case for discovery and trial. The private action was before a jury, while the government action was tried to the court.

After an eight week trial, a jury found that the Village had violated the plaintiffs' rights under the

FHA and the First Amendment. The district court (Goettel, J.) (S.D.N.Y.) then dismissed the government action, reasoning that because the Village had only passed the zoning regulations, but had not applied the regulations, there had not yet been a violation of the FHA. The district court refused to order injunctive relief because: (1) it would be enjoining acts which were already illegal; and (2) "if there is any action taken in the future which violates [the Orthodox Jews'] rights, the United States Government . . . will not be timorous about suing." *United States v. Village of Airmont*, 839 F. Supp. 1054, 1064-65 (S.D.N.Y.1993) (*Airmont I*), *rev'd and remanded*, 67 F.3d 412 (2d Cir.1995), *cert. denied*, 116 S.Ct. 2546 (1996). The district court then granted the Village's motion for judgment as a matter of law in the private action, and set aside the jury verdict.

In September, 1995, this Court reversed, see *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir.1995) (*Airmont II*), *cert. denied*, 116 S.Ct. 2546 (1996), reasoning that the evidence supported the jury's determination that the Village had violated the FHA. This Court held that there was evidence that the events leading to the incorporation of the town and the implementation of its zoning code "amply support a finding that the impetus was not a legitimate nondiscriminatory reason but rather an animosity toward Orthodox Jews as a group." *Airmont II*, 67 F.3d at 431. The court also held that there was support for the jury's finding that the motivation behind the enactment of the zoning regulations was anti-Semitism, and its "implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues." *Id.* (emphasis supplied).

This Court held that the district court erred in concluding that injunctive relief was not proper, because the FHA explicitly provides that courts enter injunctive relief against parties who have violated the FHA "'as is necessary to assure the full enjoyment of the rights granted by the [FHA].'" *Airmont II*, 67 F.3d at 434. This Court held that "[t]he view that such relief was premature because Airmont had not yet actually applied its zoning provision invidiously was a misapplication of the [FHA]." *Id.* at 434-35. The Court then directed on remand, that the district court "fashion appropriate equitable remedies." *Id.*

On remand, Judge Goettel ordered:

> . A prohibitory injunction, enjoining the Village from: (1) promoting religious discrimination; (2) denying equal protection to religions by use, interpretation, or enforcement of the zoning code; and (3) discriminating in housing based on religion, or interfering with the exercise of religion through housing.
>
> . A mandatory injunction, requiring the Village to revise its zoning code so that it could not be construed to prevent home worship, or to prevent persons from walking to and from places of religious worship. The court specifically called for an addition to the zoning code entitled "Residential Place of Worship." Such places were defined as "area[s] located within a residence that is used for the conducting of religious services." The order provided that such places "will be permitted by right on any day in all residential zones."

. The retention of documents and notification provisions. The Village was ordered to keep all documents related to zoning decisions, notify the government of any such decisions, or of any meetings of planning or zoning boards at which applications touching on religious worship will be presented.

LeBlanc-Sternberg v. Fletcher, 922 F.Supp. 959, 964-65 n. 15 (S.D.N.Y.1996) (*Airmont III*).

We review a district court's award of equitable and injunctive relief for abuse of discretion or a clear error of law. See *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1542 (2d Cir.1996).

The Village argues that the mandatory injunction conflicts with *Milliken v. Bradley*, 433 U.S. 267 (1977) in three respects: (1) the injunction is disproportionate because there is "no existing violation by [the Village];" rather "it was what the Village of Airmont will 'predictably' do that the Second Circuit found improper in its appellate crystal ball;" (2) the injunction is not remedial; and (3) the district court usurped the role of the local government by creating a new set of zoning regulations, thereby violating well-settled principles of federalism. The Village is wrong.

In *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977), the Supreme Court noted that a federal court exercising its equitable power must focus on three factors: (1) the remedy must "be determined by the nature and scope of the constitutional violation;" (2) the equitable decree must be remedial in nature, *i.e.* it must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;" and (3) the federal courts must respect

the role of state and local authorities in the management of their affairs.

Though by no means unlimited, the power of the federal courts to remedy constitutional violations is broad and flexible. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1235 (2d Cir.1987). In general, the power to intrude into municipal functions should be exercised only where there has been a constitutional violation. *Id.* The court should tailor its remedy to fit the nature and extent of the violation. See *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). "The Supreme Court has not required that the 'least restrictive means of implementation' be adopted but has 'recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Yonkers*, 837 F.2d at 1236 (quoting *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part)))). The district court has "first-hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,'" and must be given great flexibility and broad discretion in choosing a remedy best suited to curing the violation. *Paradise*, 480 U.S. at 184 (quoting *Swann*, 402 U.S. at 6). In determining whether [an] order was "narrowly tailored," the court must "acknowledge the respect owed a District Judge's judgment that specified relief is essen-

tial to cure [a Constitutional] violation." *Yonkers*, 837 F.2d at 1236 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

A district court has " 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Id.*; see also *Swann*, 402 U.S. at 15 (scope of a district court's equitable powers to remedy past wrongs is broad). Equitable relief under the FHA may "be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir.1983). In the past, this and other circuits have allowed federal district courts to make changes to, and even strike whole portions of, statutory codes to cure constitutional violations by local municipalities and ensure that the municipality did not violate the Constitution in the future. See, *e.g.*, *United States v. City of Parma*, 661 F.2d 562, 578 (6th Cir.1981), *cert. denied*, 456 U.S. 926 (1982). We have, ourselves, specifically ordered the rezoning of a municipality to ensure compliance with Constitutional mandates. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, *aff'd*, 488 U.S. 15 (1988).

1. Commensurate Remedy. The Village asserts that there was no existing violation of the FHA, and that the only violations were those found in the Second Circuit's "crystal ball." However, this court previously held that the Village had violated the FHA by passing a zoning code based on religious animus, and found it "predictable from the evidence in this record" that the Village would violate the Constitu-

tion by enforcing the code in the future in a discriminatory manner. *Airmont II*, 67 F.3d at 434. This was an egregious constitutional violation, calling for a commensurate injunctive remedy. The district court needed to fashion a remedy that both cured the past constitutional violation and obviated the threat of future constitutional violations. The district court therefore issued a prohibitory injunction and a mandatory, forward-looking injunction.

The prohibitory injunction served to cure past constitutional violations by forbidding a repetition of the Village's past discriminatory practices. Judge Goettel was clearly within his discretion when he ordered the Village to cease promoting religious discrimination, denying equal opportunity to religions by use, interpretation, or enforcement of the zoning code in a way to prevent home worship, and from discriminating in housing due to religion, or interfering with the exercise of religion through housing. Such actions are exactly those which the FHA intended to curtail.

Judge Goettel was also clearly within his discretion in ordering forward-looking, mandatory injunctive relief against "likely" constitutional violations. The affirmative injunction, requiring the Village to revise its zoning ordinance so that it could not be construed to prevent home worship and to add provisions to protect "Residential Place[s] of Worship," was necessary to ensure that the Village could not hinder or prevent worship in homes. The amendments to the zoning regulations require the Village to allow such worship—an effective way of ensuring that the village permits the use of residential dwellings for worship.

2. Remedial in Nature. Judge Goettel ordered mandatory injunctive relief grudgingly, arguing that in doing so he was forced to ignore the Supreme Court's recent instruction that injunctive relief in such cases be remedial in nature. Judge Goettel felt that affirmative relief did not improve any rights already exercised by Orthodox Jews in Airmont, but "simply [was] insurance that there can be no challenges to their exercise of religion in their homes in the future," and therefore was not truly "remedial." *Airmont III*, 922 F. Supp. at 964 n. 15. Generally, a remedial measure is one that places the parties in a position they would have occupied but for the constitutional violation. *Missouri v. Jenkins*, 115 S.Ct. 2038, 2048 (1995). However, that a measure is prospective, because it deters future constitutional violations, does not imply that it is not remedial. In certain instances, prospective injunctions are essential to ensure compliance with constitutional and statutory mandates in the future. *Cf. Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1107 (11th Cir.1994).

Here, the injunction ensured that rights to free exercise of religion were unencumbered, and the constant threat of limitation of those rights was lifted. This forward-looking aspect of the injunction only requires that the Village do that which the FHA and the Constitution already requires. See *Marable*, 704 F.2d at 1221 (FHA injunction may be structured to ensure FHA not violated in future and to remove effects of past discrimination). In that regard, it placed the parties in a position which ensured that their constitutional rights remained inviolate.

3. Federalism. There is, of course, always a federalism concern when the federal court steps in to remedy some municipal problem. This court has cautioned that federal courts should not encroach on a state's ability to remedy constitutional deficiencies, should not use a "sledgehammer where a more delicate instrument will suffice," and should not "move too quickly where it appears that the state . . . will in its own way adopt reforms bringing its system into compliance with the Constitution." *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir.1986). Here, there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future. Indeed, this Court ruled that future violations were "likely." Given the Village's history and its disregard of this Court's clear holding that it was in violation of the FHA, this injunction was necessary to ensure that the Village complied with the mandates of the FHA.

We have considered all of the arguments raised by the Village, and find them to be without merit.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 91 Civ. 2550 (GLG)

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., PLAINTIFFS

v.

ROBERT FLETCHER & NICK VERTULLO, RAYMOND KANE, MAUREEN KENDRICK, AND JOHN C. LAYNE, INDIVIDUALLY AND IN THEIR CAPACITY AS TRUSTEES OF THE VILLAGE OF AIRMONT, DEFENDANTS

No. 91 Civ. 8453 (GLG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO, IN HIS CAPACITY AS MAYOR OF THE VILLAGE OF AIRMONT, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA, AND RONALD SABO, IN THEIR CAPACITIES AS TRUSTEES OF THE VILLAGE OF AIRMONT, DEFENDANTS

[Filed: Apr. 25, 1996]

MEMORANDUM DECISION

GOETTEL, District Judge.

Following a reversal of its earlier decisions, *United States v. Village of Airmont*, 839 F. Supp. 1054 (S.D.N.Y. 1993), and *LeBlanc-Sternberg v. Fletcher*, 846 F. Supp. 294 (S.D.N.Y. 1994), and remand from the Second Circuit Court of Appeals, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1381), this Court must now comply with the Second Circuit's directives in fashioning appropriate remedies. The parties in these two actions (which were tried and appealed together) differ entirely as to what is expected of this Court at this point. In order to understand the dispute, it is necessary to review the history of the litigation in some detail.

HISTORY OF THE LITIGATION

The Town of Ramapo ("Ramapo" or the "Town") in Rockland County, New York, is a large geographical area composed of a number of incorporated villages and unincorporated areas. It has a substantial Orthodox Jewish population, consisting primarily of Hasidic Jews.

In recent years, the tendency of villages to incorporate for purposes of asserting local government control has increased substantially. Indeed, twelve villages have broken away from the Town of Ramapo.[1]

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[1] A couple of the villages were formed by Orthodox Jewish groups for the admitted purpose of creating Hasidic enclaves so that the village residents could comply with Orthodox Jew-

In the Airmont area of the Town, a group calling themselves the Airmont Civic Association ("ACA" or the "Association"), a not-for-profit association, was formed to seek the incorporation of a village ("Airmont" or the "Village"). Although the first president of that Association and a number of its leaders were Jewish, they were not Orthodox, and the Association admittedly sought incorporation of the Village of Airmont because some of its members felt that the Town of Ramapo was adopting zoning measures unduly favorable to Hasidic Jews. Their initial concern was multiple-family housing in areas zoned for single family residences. Another aspect, and a focus of later ACA concern, was the allowance of home synagogues ("shteebles") in residential areas through a liberal interpretation of the Town's Home Professional Office zoning law. Through that provision, groups of up to 49 persons were allowed to attend services in a home in a residential area provided that the portion of the home used for that purpose did not exceed half the dimensions of the ground floor and provided that only two employees were involved.

In early 1989, a referendum on incorporating the Village of Airmont was held, which passed by a three-to-one margin. The operation of the Village was, however, delayed for two years due to litigation commenced by Orthodox groups and real estate interests. The Village was finally incorporated in April 1991. Two days later, before the Village had actually commenced operation, an Orthodox Jewish Rabbi, Yitzchok LeBlanc-Sternberg (who is Hasidic), and members of his congregation instituted a private suit

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ish law. The United States government saw no unfair housing problems with respect to the formation of those villages.

claiming that the formation of the Village violated their First Amendment rights and the Fair Housing Act. 42 U.S.C. § 3601 *et seq.* The action principally sought large monetary damages and the dissolution of the Village.[2] The following month Village elections were held, and the slate of candidates supported by the ACA was elected as Mayor and Trustees. (By that point in time, however, the ACA was disbanding and, when sued in this action, defaulted). Upon incorporation, the Village did not adopt a new zoning code but continued operating for a period of time under the Ramapo code. As discussed below, it was not until 1993 that the Village adopted a zoning code.

Prior to the Village's incorporation and the commencement of the litigation, the LeBlanc-Sternberg congregation, which was located in the Airmont section of Ramapo, had already received zoning permission from Ramapo to operate a home synagogue as a "Home Professional Office" under the Ramapo interpretation.[3] The LeBlanc-Sternberg congregation has continuously operated their home synagogue for the last six and one-half years.

In late 1991, the United States commenced a separate action under the Fair Housing Act against the Village and its then Trustees, alleging that the Village had been incorporated for purposes of excluding Orthodox Jews through zoning restrictions on their places of worship. The government sought a

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[2] They sought preliminarily to enjoin the election of Village officials but this was denied by the Court because they had not made a showing of irreparable harm. *See LeBlanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1252 (1991).

[3] While there were legal challenges to that zoning grant, they were not pursued after the incorporation.

declaratory judgment and injunctive relief against further violations. The private action and the government action were consolidated for discovery and eventually trial. The defendants demanded a jury trial on the private action damage claims, but the government's action, including claims for injunctive relief, was tried to the Court. When the actions were tried, the government's case involved factually not only the LeBlanc-Sternberg congregation but also another congregation headed by a Rabbi Chaim Friedman.[4]

During the first year and a half of the pendency of these actions, there was no zoning activity concerning home synagogues. In January of 1993, however, more than a year and a half after the private action was commenced, and more than a year after the government's action was commenced, Airmont adopted its own zoning code, which was approved at a public meeting without objection. The new code modified the Ramapo zoning provision regarding Home Professional Offices. It kept the same restrictions concerning use of no more than half of the ground floor and no more than two employees but added language indicating that the Home Professional Office should

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[4] Rabbi Friedman's congregation had also commenced a separate lawsuit looking for damages of its own. That action remains pending before a different Judge in the Southern District of New York. That congregation was attempting to build a free-standing synagogue, which did not fall under the home professional office exception. Although Friedman's application to build the synagogue was eventually approved by the Town Planning Board, the congregation had problems with finances and safety aspects of the State's building code. In the interim, it has functioned in the Rabbi's home as a Home Professional Office.

not generate activities inconsistent with a residential area. The change in the zoning code did not result in any amended pleading being filed in either action or any request for temporary injunctive relief being made. Since the date of its passage, the provision of the amended zoning code concerning Home Professional Offices has never been applied or interpreted.

The consolidated cases went to trial in October of 1993. The trial lasted seven weeks. The jury deliberations lasted for a full week—the longest that this Judge has ever seen for a civil case. The private action was submitted to the jury on a special verdict form containing a number of interrogatories. Eventually the jury returned the verdict form answering most questions in favor of the defendants. It found for all of the individual defendants awarding no damages against any of them. It determined that the majority of voters who favored incorporation were not motivated even in part by discrimination against Orthodox or Hasidic Jews. It did find, however, that the Village had violated the private plaintiffs' fair housing rights and had conspired to violate their rights to the free exercise of religion or free speech. Despite these findings, the jury did not award any damages against the Village, not even nominal damages. In the view of the only Judge present during these lengthy proceedings, this was a compromise verdict and, to an extent, an inconsistent one. This Court then decided the government's action in favor of the Village and its Trustees, finding essentially that, while some bias against the Orthodox Jews existed among Village officials, the Village had done nothing to interfere with their religious practices or fair housing rights. Consistent with that, we reversed that portion of the

jury's verdict that had found against the Village. Both plaintiffs then appealed.

THE COURT OF APPEALS DECISION

The Court of Appeals first reversed this Court's entry of judgment on behalf of the Village in the private plaintiffs' case. In a lengthy opinion it noted that the defendants had demanded a jury trial on the damage aspects and held that, if a claim for damages is joined with an equitable claim, the right to a jury trial on all issues common to both claims prevails. *LeBlanc-Sternberg*, *supra*, 67 F.3d at 426.

With respect to the apparent inconsistency of the verdicts, it held that it was the duty of the District Court to harmonize the jury's responses by seeking an explanation supportable by the record to correct the apparent inconsistency. *Id.* at 427. The appellate panel divined that the jury "may have been persuaded that the violative act [of the Fair Housing Act] was the enactment of the Airmont zoning code," *id.* at 428, and that it was a "fair inference" that the jury viewed this as an act designed to limit home synagogues, thus make housing unavailable to Orthodox Jews.[5] *Id.*

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[5] Since a Village is an inanimate body which cannot do anything without human action, the Court of Appeals had to explain why the individual defendants who had passed the zoning change were not personally liable. The opinion resolves this by noting that the jury was charged, in answer to its specific question, that the Trustees had legislative immunity with respect to their official acts in voting legislation. *Id.* at 428. As to whom the Village was conspiring with, since it could not conspire with itself or its own officials, the Circuit Court concluded that it was "easily inferable" [*sic*] that it had conspired with the Airmont Civic Association. *Id.* However, the ACA had gone out of existence and ceased activities before

It, therefore, found the jury's verdict consistent "with fully supportable findings," *id.* at 429, which were reasonable, and it required the District Court to accord the jury's verdict such an interpretation.[6] *Id.* It chastised the trial court for making findings of fact, for weighing the evidence, and for not following findings that were "implicit" in the jury's verdict.[7] *Id.* at 430.

The lengthy decision then cites all of the evidence it could muster from the trial record to support its factual findings. It concluded that, taking the evidence in the light most favorable to the private plaintiffs, "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic

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the zoning code was amended. Indeed, it had been the subject of a default judgment a year earlier.

[6] The jury, having found for the individual defendants and not having awarded any damages, it would seem that we were dealing solely with injunctive relief, which is always a matter exclusively for the Court.

[7] With respect to factual findings, we note that the appellate decision found that numerous outrageous anti-Orthodox statements were made by various of the individual defendants. While there was evidence that such statements were made, there was also evidence of denials by the various defendants of having made such statements, in some instances supported by tape recordings of the hearings in question. Moreover, while the decision recites minutes concerning "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan Countys," *id.* at 418, the minutes were reporting statements made to the group by the Jewish Superintendent of Ramapo who had been named as a defendant in the private action, but had been dismissed on motion by this Court.

Jews, and that Airmont pursued this goal jointly with ACA."[8] *Id.* at 431. The opinion further held that plaintiffs were entitled to nominal damages because it was "plain error" for the trial court to instruct the jury that it "may award" such damages, rather than that it must do so, citing *Gibeau v. Nellis*, 18 F.3d 107, 110-11 (2d Cir. 1994).[9] *Id.* With respect to injunctive relief, it held that on remand the Court should consider "whether injunctive relief may also be appropriate." *Id.* at 432. The Court did uphold the verdict on behalf of the five individual defendants finding that the plaintiffs had received a fair trial and there was no basis for reversal of the verdicts in their favor. *Id.* at 433.

With respect to the government's action, which under this Court's decision had resulted in a complete victory for the defendants, it held that the government can get the benefit of nonmutual offensive collateral estoppel, although it could not have been imposed against the government. *Id.* at 434. Consequently, having made findings resulting in a jury verdict against the Village in the private action, it held that this Court could not properly make findings that contradicted what the appellate decision said the jury had intended.[10] *Id.* The net effect was that by

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[8] See footnote 5, *supra*, concerning the status of the ACA at this point in time.

[9] The appellate decision did not bother noting that this "plain error" derived from a case that was not decided by the Court of Appeals until months after the trial of this action.

[10] This Court's decision had made extensive factual findings. *See United States v. Village of Airmont*, 839 F. Supp. 1054 (S.D.N.Y. 1993). The appellate decision did not dispute any of these specific findings but instead superimposed its view of the jury's findings so as to render them immaterial.

appellate alchemy the government's total loss was converted into a complete victory. The government's action was remanded for injunctive relief and the fashioning of appropriate equitable remedies applying Fair Housing Act principles. *Id.* at 435.

INJUNCTIVE RELIEF

The Defendant Village's Position

The Village opposes granting any injunctive relief. It notes that the zoning code on which the Court of Appeals focused did not come into existence until long after these lawsuits had been filed. The Village argues that there has never been an application by the Orthodox Jews (or anyone else, for that matter) for additional places of worship in the Village, nor has there been a request for interpretation of the zoning code. Consequently, it contends that there has been no demonstration of discriminatory impact, direct or indirect, by the zoning code, either as written or as applied. The Village notes that the private plaintiffs conceded at trial that the Village had not interfered with their worship services.[11] Consequently, it asserts that the plaintiffs have not met their burden of showing any real or immediate threat that they will be wronged, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), nor have they demonstrated any indication of real and imminent harm. *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

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[11] However, some individuals did make such attempts, albeit unsuccessfully, by monitoring the number of persons attending services.

The Court Of Appeals Holding

There is considerable substance to the Village's argument. However, it has one fault—it is contrary to the emphatic directions of the Court of Appeals that injunctive relief must be granted to avoid discrimination in a manner "found to be predictable from the evidence in this record," *LeBlanc-Sternberg, supra*, 67 F.3d at 434, and that "on a practice that . . . is about to occur" the Court is authorized to grant injunctive relief. *Id.* at 425. With respect to the claims brought under the Fair Housing Act, we are directed to enter such injunctive relief "as is necessary to assure full enjoyment of the rights granted by [the Act]."[12] *Id.* at 434.

The Government's Request For Injunctive Relief

The Court of Appeals decision authorizes relief to parties who "will be injured by a discriminatory housing practice that is about to occur," citing 42 U.S.C. § 3602(i). *Id.* at 425. In light of that Court's interpretation of the jury's verdict, as applied in the government's case, the government has understandably focused its request for injunctive relief on the zoning code. However, rather than requesting prohibitory injunctive relief against illegal or unconstitutional applications of the code, the government has sought to redraft the zoning code in an affirmative manner. In its memorandum in support of its request, the government argues that "[t]aken together, these changes will help ensure that the Village will permit the use

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[12] No citation of authorities for this proposition—*i.e.* where no action has been taken or is imminently threatened—is set forth by the Court of Appeals, other than the language of the Act itself.

of residences for regular religious worship and that it will otherwise respect the rights of Orthodox and Hasidic Jews to live and pray in Airmont."[13] Government's Memorandum at 11.

The Village notes that the zoning changes requested by the government would allow a home synagogue to operate in virtually every house and could completely eviscerate its zoning code. That may well be. The Second Circuit opinion appears incompatible with the decision of the Eleventh Circuit in *Grosz v. City of Miami Beach, Florida*, 721 F.2d 729, 741 (1983), *cert. denied*, 469 U.S. 827 (1984), and the decision of the Sixth Circuit in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, *cert. denied*, 464 U.S. 815 (1983). In addition, it would appear to contradict an earlier decision in this District which also concerned Ramapo. *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655 (S.D.N.Y. 1984). However, while we may disagree with the ruling of the Circuit Court, we are compelled to follow its directions.

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[13] The government's changes in the zoning code are obviously intended to assist only Orthodox Jews and not other smaller religions that conduct home services, which is a questionable favoring of one religion. However, that conforms to the Court of Appeals' conclusion that the need for home places of worship is "unique to the Orthodox and Hasidic Jews." *Id.* at 430-31. (The Court of Appeals reached this conclusion on the debatable basis that Orthodox and Hasidic Jews were the only ones who had applied to conduct services under Ramapo's home professional office provisions.) There was, however, evidence at trial of other small non-Jewish religious groups which held home services.

Since the Village has done nothing except pass a zoning code which has never been enforced or interpreted, and there are no actions to overturn, it would seem that there is no other way of satisfying the remand directions except by revising the existing zoning code.[14] Consequently, we accept in general the government's approach to amending the zoning code as being the only practical way of complying with the remand order.[15] We will, therefore, in a separate order and judgment, enjoin the Village and its officers, employees, agents, successors, and assigns from promoting religious discrimination; from denying equal opportunity to religion by use, interpretation, or enforcement of the zoning code in such a manner that it prevents home worship; from dis-

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[14] Any attempt to enforce the code in violation of the Fair Housing Act or constitutional rights would, of course, be illegal even without injunctive relief. However, as the government argues, a preventive injunction can be enforced by contempt sanctions without the necessity of instituting new litigation.

[15] We do this despite the Supreme Court's teaching in *Rizzo v. Goode*, 423 U.S. 362 (1976), that, in light of considerations of federalism, "[w]here . . . the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Id.* at 378, *citing Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). We also ignore the more recent Supreme Court directive that equitable relief must be remedial in nature, *i.e.* it must be designed to restore as nearly as possible the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. *Missouri v. Jenkins*, —— U.S. ——, 115 S. Ct. 2038 (1995). We do not see the relief requested as improving in any way the rights already exercised by the Orthodox in Airmont. The relief simply is insurance that there can be no challenges to their exercise of religion in their homes in the future.

criminating because of religion or interfering with the free exercise of religion in connection with housing; and from taking any action that limits the availability of housing on the basis of religion. Specifically, we will direct a revision of the zoning code so that it will not be construed to prevent home worship, or to prevent persons from walking to and from religious services at such places of worship, or to prevent home worship services on any day in all residential zones. In addition, the phrase "place of worship" will be replaced with "free-standing place of worship" throughout the zoning code and will be redefined so as to allow a portion of the building to be dedicated as living quarters for clergy and their families; and the phrase "neighborhood place of worship" will be added and will refer to larger structures used exclusively for the conducting of organized religious services, which will be permitted in all residential zones. In addition, as requested, we will order that the last two sentences of the definition of "Home Professional Office" be deleted.[16]

The government also requests that the Village be directed to retain applications for residential homes of worship for five years. In light of the changes made in the zoning code, we do not foresee the need for zoning applications. The government also requests

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[16] We do not wish to imply that we have any agreement whatever with the Ramapo approach to home places of worship. While construing these as professional offices might have been a satisfactory political solution to a difficult question, it is intellectually dishonest to categorize services involving up to fifty people as being an activity of a home professional office such as might be conducted by a doctor, lawyer or religious leader who simply consulted with a couple of members of his congregation.

that for five years the Village notify the government of any zoning and planning applications which relate to religious worship or changes in the zoning relating to religion. While we deem it highly unlikely, under the circumstances, that the Village would entertain anything relating to religion under the zoning laws, we see no harm in including that in the relief granted.

Private Plaintiffs' Requests

The private plaintiffs' main request for injunctive relief is a major one: they seek the dissolution of the Village. They argue that they have proved that the defendants have engaged in a pattern or practice of discrimination and that discriminatory intent was at the root of the incorporation of the Village and consequently, they maintain, they are entitled to this remedy.

There are several fallacies to this argument. In the first place, there has been no finding of religious discrimination with respect to the incorporation of the Village of Airmont. Indeed, the jury found that the majority of voters who supported the incorporation of the Village were not involved in religious discrimination. Moreover, the appellate decision remanding the action focuses upon the change in the zoning code as to which no action has ever been taken. There is nothing in the Court of Appeals' decision even remotely suggesting that the Village must be dissolved. The Second Circuit has held, in *Dean v. Coughlin*, 804 F.2d 207, 213 (1986), that we should not use a sledgehammer where a more delicate instrument will suffice. We believe that the relief requested by the government and granted by this Court adequately meets the Second Circuit's concerns expressed in their decision.

Another problem with the private plaintiffs' request is that it has no support in either the statute or case law. The private plaintiffs rely on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). That case was virtually the converse of the present situation. The state legislature in Alabama had revised the boundaries of the City of Tuskegee so as to eliminate the famous black Tuskegee Institute which included most of the black residents of the City. The Supreme Court reversed this action, finding that it was contrary to the Fifteenth Amendment by depriving blacks of their right to vote on account of their race.

Curiously, the private plaintiffs ask, alternatively, for relief similar to what the Supreme Court condemned in *Gomillion*. They seek a plan to redistrict the Orthodox "who reside in some localized area of Airmont" back into the Town of Ramapo. We doubt that we could adequately ascertain what the localized area would be. (The six-lane New York Thruway forms a natural boundary between Ramapo and Airmont.) Moreover, the Orthodox population in Airmont has *increased* since the formation of the Village. That relief also seems both contrary to the directions of the Court of Appeals and of doubtful legality in its own right. The Supreme Court recently ruled that the government may not establish boundaries according to religion. *Board of Education of Kiryas Joel Village School District v. Grumet*, —— U.S. ——, 114 S. Ct. 2481 (1994). As the Second Circuit has held, the purpose of the Fair Housing Act is to promote integration, not to encourage segregation. *Otero v. New York City Housing Authority*, 484 F.2d 1122 (1973). Finally, the local government law of New York has provisions for alteration of municipality lines, incor-

poration or unincorporation of local villages. To the extent that a discreet area of Airmont could be described, we know of no inhibition on that area's holding a referendum to remove itself from the Village of Airmont.

The private plaintiffs also request relief similar to that requested by the government. (Indeed they join in all of the government's requests.) The remand instructed this Court that it "should consider . . . whether injunctive relief may also be appropriate." *LeBlanc-Sternberg*, 67 F.3d at 432. While we question whether the private plaintiffs, whose rights have long been vested, require any injunctive relief at all, that which has been granted in the government's action will more than suffice. We believe that, to the extent that their requests are justified, they have been adequately encompassed by granting the government's requests.[17]

DECLARATORY JUDGMENT AND NOMINAL DAMAGES

While the Village disputes the need for declaratory relief, the Court of Appeals remanded the action for a declaration that the Village violated the Fair Housing Act. Consequently, we have no alternative except to so declare. The action was also remanded for purposes of granting nominal damages to the private plaintiffs. The remand does not indicate in what

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[17] At times in dealing with the private plaintiffs' action in its opinion, the Second Circuit acts as if they were pursuing a class action. They were not. They were seeking money damages and the abolition of the Village on their own. Another Orthodox group, as mentioned above, has pending its own separate action.

amount the nominal damages should be, but the traditional amount has been $1.00. Consequently, we award each of the private plaintiffs nominal damages in the amount of $1.00.

ATTORNEYS' FEES

The remand decision in this case did not mention attorneys' fees. The private plaintiffs, however, request the Court to set a schedule for them to make an application for attorneys' fees as the prevailing parties in this action. We question whether the private plaintiffs are truly the prevailing party in the private action. They lost to the five individual defendants who are clearly prevailing parties. Moreover, to the extent that the private plaintiffs are the prevailing party against the Village, they have not prevailed on their major goals of recovering substantial monetary damages and having the Village dissolved. While the Supreme Court and the Second Circuit have been taking dramatically different approaches to the need for attorneys' fees to be proportionate to the success obtained, the Supreme Court has held that a plaintiff who obtains only nominal damages when suing for a much larger sum is usually not entitled to attorneys' fees, even though he technically qualifies as a prevailing party. *Farrar v. Hobby*, 506 U.S. 103 (1992); *but see Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2d Cir.), *cert. denied*, 115 S. Ct. 205 (1994).

There is a practical reason for not awarding the private plaintiffs attorneys' fees here. Two of the prevailing defendants have an application pending for attorneys' fees.[18] If we direct the Village to pay

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[18] This application was argued some time ago. However, after the appeal was filed and the appellate panel selected, this

attorneys' fees of the plaintiffs and the plaintiffs to pay the attorneys' fees of the two individual defendants, what we have will amount to directing the Village to pay the attorneys' fees of the individual defendants.[19]

We do not, however, rule on this matter at this time since no application for attorneys' fees as such has been made, rather a request that we set up a "schedule." The private plaintiffs' counsel are free to make any application which is timely, under the rules and the case law. The issue will be decided at that time.

SO ORDERED.

Dated: April 25, 1996
White Plains, N.Y.

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

Court thought it prudent not to act upon their application at that time.

[19] This, in fact, is a relief which two of the individual defendants, who were separately represented in this action, sought to obtain in the first place.